91-755

Supreme Court, U.S.
FILED
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NO. _____

In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 5, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred in ordering the federal district court on remand to take into account post-enactment evidence (never placed before or considered by the enacting legislative body) in reconsidering the constitutionality of a county minority set-aside ordinance, found to be unconstitutional under this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)?

2. Whether an ordinance found by the Court of Appeals to be overbroad on its face under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), may, by judicially narrowing its reach, be utilized to deny petitioner Coral Construction Company damages for the racial discrimination it suffered in the competitive bidding process?

LIST OF INTERESTED PARTIES

Those parties listed in the caption, and no others, were parties to the proceedings in the Ninth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Coral Construction Company and Oregon Columbia Chapter of the Associated General Contractors of America, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 8, 1991.

OPINIONS BELOW

The Ninth Cicruit's opinion is reported at 941 F.2d 910 (9th Cir. 1991) and is reproduced in the Appendix to this petition at A3-51. The district court

opinion is reported at 729 F. Supp. 734 (W.D. Wash. 1989) and is reproduced in the Appendix at A52-67. The ordinance under review, King County, Wash., Ordinance 8937 (May 1, 1989), codified as King County Code Chapter 4.18 (6-89), is reproduced at A68-124.

JURISDICTION

The petitioners brought this action in United States District Court for the Western District of Washington pursuant to §§ 1331, 1343(a)(3) and (4). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on August 8, 1991. *See* A1. The instant petition for writ of certiorari has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 Equal Rights Under the Law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1983 · Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In the wake of this Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), King County, Washington (which encompasses the City of Seattle) hastily reviewed and reenacted a 1981 ordinance that had granted a preference to minority-owned and women-owned business enterprises (WBEs and MBEs) in competition for County construction contracts. *See* King County, Wash., Ordinance 8937 (May 1, 1989), codified as King County Code Chapter 4.18 (6-89). (A67). ("Ordinance").

The Ordinance extends two types of contracting preferences. If the County contract is under $10,000, the bid of an MBE or WBE is preferred over the lower bid of any other firm as long as the latter is not more than 5 percent below the bid that the MBE or WBE submits. *Id.* at § 4.18.060 A. 1. (A103-04). If the County contract exceeds $10,000, the successful bidder must use MBEs and WBEs to perform prescribed percentages of the contract work. *Id.* at § 4.18.060 A. 2.[1] (A105-07). The 5 percent bid prefer-

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[1] The County's director of its department of executive administration will establish an MBE and a WBE percentage for each contract "based on the extent of subcontracting opportunities presented by the contract and the availability of minority and women's business enterprises qualified to perform such subcontracting work." *Id.* at § 4.18.060 A. 2. a. (A105). Annual utilization goals for five categories of county contracts must also be set. *Id.* at § 4.18.030 A. (A95). Individual contract utilization goals (continued...)

ence may be utilized on these larger contracts--as it was here--if the County contracting officials determine that the bid preference is a "more feasible method of achieving" their annual utilization goals. *Id.* at § 4.18.060 C (A108).[2]

This case arose out of a County contract for the installation of guardrail. Three responsive bids were submitted. Petitioner Coral Construction Company, an Oregon corporation with a branch office in King County, submitted the low bid of $178,100. *Coral Const. Co. v. King County*, 941 F.2d 910, 914 (9th Cir. 1991) (A6). However, the County extended a 5 percent bid preference to Dirt & Aggregate Interchange, Inc. ("Dirt and Aggregate"), an MBE also based in Oregon, which had submitted a bid of $185,153.50 and decided to award the contract to Dirt and Aggregate on that basis. *Id.*

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[1](...continued)
may be higher or lower than the annual utilization goals. *Id.* at § 4.18.060 A. 2. a (A106).

[2] Set-aside levels may be reduced, or waived in certain circumstances. *Id.* at §§ 4.18.060 B. 1. (A107) and 4.18.070 (A110). Grounds for reduction or waiver include infeasibility because of contract requirements to meet the goals, unavailability of qualified MBEs or WBEs despite diligent search, or that MBE or WBE bids "exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination." *Id.* at § 4.18.060 B. 1. c. (A108). *See also id.* at § 4.18.070 A. 5. (A111).

Petitioners Coral Construction and the Oregon Columbia Chapter of the Associated General Contractors of America, Inc., brought this suit in the United States District Court for the Western District of Washington, alleging that the preference program, on its face and as applied to Coral, violates the Equal Protection Clause of the U.S. Constitution, and 42 U.S.C. §§ 1981 and 1983. Coral requested damages, injunctive and declaratory relief, and attorneys' fees.

Upon cross-motions for summary judgment, the district court upheld the preference program. *Coral Const. Co. v. King County*, 729 F. Supp. 734, 740 (W.D. Wash. 1989) (A76). After the decision, the County awarded the contract to Dirt & Aggregate.

On appeal, the Ninth Circuit affirmed the district court's ruling on the WBE preference (*Coral Const. Co.*, 941 F.2d at 932-33) (A56-58), but reversed its ruling on the MBE preference. Relying on *Croson*, the Ninth Circuit found that King County had failed to establish a "compelling interest" in its MBE program at the time of enactment. The Court of Appeals noted that the "anecdotal" evidence of racial and ethnic discrimination cited by the County fell well short of establishing "a systemic pattern of discrimination necessary for the adoption of an affirmative action plan." *Id.* at 919 (A19). The County Council had before it no "statistical data in support of the County's MBE program." *Id.* at 918 (A17). The appellate court concluded that "strict scrutiny demands a fuller story." It added that "[n]ot enough has been told so far to meet King County's burden that its program passes

the 'compelling government interest' requirement." *Id.* at 919 (A20).

The court below then remanded the case to the district court, directing it to review additional evidence that was never placed before nor considered by the County Council in making the decision to reenact the ordinance in 1989, and on that basis to decide whether the ordinance could be supported by a compelling interest. The post-enactment evidence included, but was not necessarily limited to, two studies completed in January and July of 1990 (*i.e.*, the Perkins Coie Consultant Study and the Washington Consulting Group Study), which examine MBE and WBE participation in County procurement. (Neither study was considered below. *Id.* at 919-20 n.10. (A20-21).)

The court of appeals also found that the MBE program is not "narrowly tailored." The Ordinance provides a preference to minority businesses that have not been discriminated against "in the particular geographical areas in which they operate." King County, Wash., Code § 4.18.010 S (A89). The court concluded: "This definition is overly broad. Since the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against *in King County*." *Coral Const. Co.*, 941 F.2d at 925 (emphasis in original) (A36).

Again, however, the circuit court denied relief. Instead, it remanded the case to the district court for an inquiry into "whether this violation entitles Coral Construction to an award of damages. . . ." *Id.* at 926

(A39). It explained that "the record does not indicate whether Coral Construction lost its bid to a business which King County should not have considered." *Id.*[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED IN ORDERING THE DISTRICT COURT ON REMAND TO TAKE INTO ACCOUNT POST-ENACTMENT EVIDENCE NEVER PRESENTED TO OR CONSIDERED BY THE ENACTING LEGISLATURE AS THE BASIS FOR REEVALUATING THE CONSTITUTIONALITY OF THE COUNTY'S MINORITY PREFERENCE ORDINANCE

This case presents an important question involving the proper role of federal courts in reviewing state and local legislative decisions found to be constitutionally wanting on the strength of the evidence before the legislative body at the time of enactment. Here, a County ordinance setting forth a minority preference program for County construction projects was held to be unconstitutional, because an insufficient showing of discrimination in the County's construction contracting market had been made to the

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[3] The ordinance was amended again in 1990 after the district court's opinion. *Id.* at 915 (A7). The court of appeals declined to consider the amendment, and ruled that the amendment did not moot Coral Construction's demand for damages, *id.* at 927-28 n.16 (A43) (*citing Croson*, 488 U.S. at 478 n.1), and for injunction and declaratory relief. *Id.*

County Council. *See id.* at 919 (A20). Nonetheless, the Ninth Circuit denied relief. Instead, it remanded the case to the district court to receive and evaluate post-enactment evidence unavailable to the County Council when the Ordinance was reenacted in May of 1989, and to decide independently whether that new evidence establishes a remedial need for such an ordinance--in short, to substitute the court's judgment as to the need for, and proper scope of, a county ordinance based on newly developed evidence.

This Court, in *Croson*, insisted that race-based ordinances of this kind must be compelled to survive constitutional scrutiny. 488 U.S. at 469. To meet the exacting standard applicable to such legislation, it is incumbent on the legislative body to demonstrate an evidentiary basis that racial discrimination exists and persists in the relevant geographic market and that alternative remedial measures to eliminate it have not been effective. *Id.* at 504, 507. Strict scrutiny review constrains the legislative body to act only when it can show that it "is pursuing a goal important enough to warrant use of a highly suspect tool" and only in a way that demonstrably "fit[s]" the "compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*, 488 U.S. at 493 (Opinion of O'Connor, J., plurality opinion).

Such a showing concededly could not be made by the King County Council in the present case. Rather than returning the issue to the Council for reconsideration based on additional, new evidence, the court below assigned that peculiarly legislative

function to the federal district court. Moreover, its remand order gave the Ordinance's admittedly overbroad geographic coverage a judicially invented narrow construction that limited its reach to King County.[4]

The errors are fundamental and require plenary review by this Court. A federal court has neither the power nor the proficiency to exercise the legislative functions of a state legislature. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 482 (1973); *see also Joseph Skilken & Co. v. City of Toledo*, 528 F.2d 867, 881 (6th Cir. 1975) *vacated and remanded*, 429 U.S. 1068 (1977).[5] This is not to suggest that the district court in this case is incapable of evaluating the later

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[4] The Ninth Circuit directed petitioner on remand to show that the successful minority contractor had, in the past, worked in King County in order to recover damages. *See Coral Const. Co.*, 941 F.2d at 925 (A37). But petitioner is already entitled to damages, on the facts established, since the entire ordinance failed constitutional scrutiny. *Id.* at 919, 926 (A20, A39). *See* discussion *infra* at pp. 19-23.

[5] The decision in *Joseph Skilken & Co.* was vacated and remanded by the U.S. Supreme Court "for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Hills v. Gautreaux*, 425 U.S. 284 (1976). Upon remand, the Sixth Circuit adhered to its decision. *Joseph Skilken & Co. v. City of Toledo*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977).

developed studies that have been offered below as relevant to the discrimination issue. That and other evidence, along with responses or rebuttal from petitioners may--if made part of the legislative record--require exacting judicial scrutiny at some future date.

But the Ninth Circuit's remand order puts the judicial cart before the legislative horse. Under *Croson*, 488 U.S. at 504-05, it is the legislative "findings" that determine the constitutionality of an ordinance seeking to classify by race--not *post hoc* judicial "findings" arrived at independently on the basis of evidence never considered by the legislators at the time of the ordinance's enactment. Our federal judicial system is composed of courts of limited jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Constitutionally, they are confined to resolving "cases" or "controversies." U.S. Const., Art. III, Sec. 2. Accordingly, the evidence and arguments that become the record for decision are case-particular and party-specific. Necessarily, the broader policy considerations and wider public participation that distinguish legislative debates from judicial argument cannot be fully brought to bear in the courtroom setting. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330, n.12 (1985) (noting legislature better at amassing and evaluating data on factual issues).

The federal district court, in short, is particularly ill-suited to try to predict what King County Council's legislative response might be if challenged to revisit its 1989 ordinance in light of newly developed studies or other evidence, together with whatever critiques or

responses might be offered in rebuttal. Whether the same ordinance would emerge, or one drawn more narrowly or more expansively, necessarily remains an open question. It is, however, a question that must be answered in the first instance in the legislative arena, not--as the remand order maintains--in the federal district courts which are without authority to fashion legislation, particularly legislation at the state or local levels. *See e.g. Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *United States v. Reese*, 92 U.S. 214, 221 (1876); *and see James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439, 2451 (1991) (Scalia J., joined by Marshall and Blackmun, JJ., concurring) ("the judicial power is . . . the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it.").

Were the Ninth Circuit dealing here with an Act of Congress, the separation of powers doctrine would bar such a remand order. *See Aptheker v. Secretary of State*, 378 U.S. 500, 515-16 (1964); *see also Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (separation of powers "at the heart of the constitution"). The fact that a county ordinance is involved gives the federal judiciary no greater license to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Indeed, the generally accepted view is that in such circumstances the federal courts have even less excuse for judicial legerdemain. *See generally Freedman v. Maryland*, 380

U.S. 51, 60 (1965) (it is for the state to decide "how or whether" to create proper procedural safeguards).

To suggest otherwise flies in the face of basic notions of federalism on which this country is founded. *See Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 2399 (1991) ("states retain substantial sovereignty under our constitutional system"). It is one thing for the federal courts to evaluate a challenge to a local ordinance on constitutional grounds; that is done repeatedly. *See e.g., Croson*, 488 U.S. at 511; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Levitt*, 413 U.S. at 479. It is quite another--having determined the ordinance cannot pass constitutional muster (*Coral Const. Co.*, 431 F.2d at 926 (A39))--to assign to the federal judicial branch the uniquely legislative function of receiving, evaluating and making policy judgments on newly developed evidence not previously before the local legislative body, in an attempt to shore up the ordinance's constitutional infirmities. Courts cannot and do not enjoy the full play of open debate that informs legislative determinations. *See Gwin, White & Prince v. Henneford*, 305 U.S. 434, 449 (1939) (Black, J., dissenting) (calling for "a broad and deliberate legislative investigation--which no court can make . . ."). That which may suggest a compelling need for a racial preference within the confines of a particular court dispute could become far less compelling with the opportunity of others uninvolved in the "case or controversy" to offer other evidence to the County Council in rebuttal.

It is, therefore, the *legislative* "findings" which this Court held in *Croson* to be of paramount importance in discerning whether there exists the requisite predicate for a set-aside program based on race. 488 U.S. at 500. "[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Id.* "Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* at 510 (O'Connor, J., plurality opinion). For a federal court to usurp that local prerogative--or, more accurately, that local responsibility--disserves both the Supreme Court precedent and basic federalism.[6]

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[6] This Court recognized the importance of legislative findings well before *Croson*. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) ("a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted.") (Powell, J., plurality opinion). The Eighth Circuit stated the point most succinctly in *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), where it concluded:

> "Because the justification for race-conscious affirmative action is remedying the effects of

(continued...)

The Ninth Circuit's error signals a Circuit split that requires resolution by this Court. In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia, et al.*, ___ F.2d __ (3d Cir. 1991) 1991 U.S. App. Lexis 22718, the Third Circuit Court of Appeals entered a similar remand order to permit additional discovery of evidence that had allegedly been available, but admittedly had not been before the City Council of Philadelphia at the time it enacted a racial preference program.[7] The Sixth Circuit, by contrast, in *Michigan*

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[6](...continued)
past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. Likewise, a court can determine that the remedy substantially relates to its purpose only if it is certain that the persons shaping and implementing the plan understood the nature and extent of the past discriminatory practice."

[7] The Court of Appeals declined to decide whether such extra-legislative evidence regarding discrimination in the City's construction market would be material proof of legislative purpose, leaving that question open for the district court. ___ F.2d at ___, n.7, 1991 U.S. App. Lexis 22718 at 20, 21 n.7.

Road Builders Ass'n v. Milliken, 834 F.2d 583, 590-94 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989), confined its review to the legislative record as compiled *before* enactment of remedial legislation that classifies along racial lines.[8] The Sixth Circuit's decision comports with *Croson*; the Ninth Circuit's decision below, and the Third Circuit's similar ruling do not.

Nor has the Ninth Circuit provided a persuasive basis for departing from the *Croson* precedent. The suggested "dilemma" facing King County--on the assumption that discrimination was the standard operating procedure in the construction industry and

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[8] Tension among various district court opinions also suggests that Supreme Court guidance is needed on this point. In *Harrison v. Burrowes*, 743 F. Supp. 977, 1000 n.23 (N.D.N.Y. 1990), the court suggested *Croson* permits the use of post-enactment evidence. Pre-*Croson* cases also hold that evidence not before the legislature may be used to prove discrimination. *Ohio Contractors Ass'n v. Economic Development Administration*, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978); *Rhode Island Chapter, Assoc. Gen. Contractors v. Kreps*, 450 F. Supp. 338, 355 (D.R.I. 1978). By contrast, in *Cone Corp. v. Hillsborough County*, 730 F. Supp. 1568, 1569 (M.D. Fla.), *rev'd*, 908 F.2d 908, *cert. denied*, ___ U.S. ___, 111 S.Ct. 516 (1990), review was confined to the legislative record, with the court declining to consider post-enactment evidence. *See also American Subcontractors Ass'n, Georgia Chapter, Inc. v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662, 665 n.6 (1989) (same); *F. Buddie Contracting Company v. City of Elyria*, ___ F. Supp. ___, (N.D. Ohio 1991) 1991 U.S. Dist. Lexis 13115 (1991) (same).

that, without some statutory protection, the County could be held vicariously liable for such discrimination--is no "dilemma" at all. The facts of this case belie the assumption of systemic discrimination. The County denies that *it* has unlawfully discriminated in awarding contracts. *See* Ordinance, § 4.18.005 B (A79). Moreover, both the State of Washington and King County have anti-discrimination laws that already reach discriminatory conduct. *See* Rev. Code of Washington, Chapter 49.60, and King County Code Chapter 12.16. So, too, does the federal government. *See* 42 U.S.C. § 1981 (barring racial discrimination in the "making and enforcing of contracts"). King County remains free to discipline any of its own employees who discriminate against MBEs in the contract bid process, and could have enacted other race-neutral measures, if necessary, to address any other problem--even as it debated the propriety and need for racial preferences. Thus, the County faced no real exposure to liability, and properly should have resolved this issue through the legislative process. Indeed, chances are that the County Council could, if compelling facts existed, pass an acceptable law more rapidly than a final resolution would emerge, after all appeals, from the courts.

The Ninth Circuit's second justification for its remand order is equally wanting. 941 F.2d at 921. (A24) The court below endeavored to use this Court's decisions in *Arlington Heights*, 429 U.S. at 270 n.21, and *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 285-86 (1977), as support for its decision to direct the district court to extend its constitutional scrutiny

beyond the four corners of the ordinance and its legislative history. But *Arlington Heights* and *Mount Healthy* are inapposite. The inquiry in those cases was directed towards the motives of the government actors *at the time they acted.* Since there was in each case evidence that the motives for the action taken were mixed--*i.e.*, that both racial and non-racial considerations were at work--the Court permitted the government actors to make an evidentiary showing that the decision made would have been the same in the absence of any unlawful motives. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

The instant action is not a "mixed motive" case, however. The legislators' "motives" are not under scrutiny. Rather, the Ninth Circuit's inquiry concerns matters never before the legislators at the time they acted; indeed, the studies in question did not even exist at the time. It is thus clear that the remand order is concerned not with whether the County Council acted with proper or improper motives, but whether there exists outside the legislative record an independent basis for enactment of a race-based remedial set-aside measure.

Neither *Arlington Heights* nor *Mount Healthy* assigns that responsibility to the courts. *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985); *Regents of University of California v. Bakke*, 438 U.S. 265, 289, 320 nn.27, 54 (1978) (Powell, J., concurring). Whether the County can establish a compelling interest for enactment of a racial set-aside program remains a peculiarly legislative matter to be resolved at the county level on the strength of council "findings." *See*

Croson, 488 U.S. at 504-05. The Ninth Circuit's contrary ruling is reversible error.

II. THE COURT BELOW ERRED IN HOLDING THAT AN UNCONSTITUTIONALLY OVER-BROAD ORDINANCE MAY, BY JUDICIAL NARROWING, BE UTILIZED TO DENY PETITIONER DAMAGES FOR RACIAL DISCRIMINATION SUFFERED IN THE COMPETITIVE BIDDING PROCESS

The Ninth Circuit also found that the King County ordinance is not "narrowly tailored," because it gives a racial preference to contractors who have never even sought to work in the King County market. The court below correctly held that the Fourteenth Amendment does not, under any circumstances, allow King County to give a racial preference to MBEs never "victimized by discrimination within King County." *Coral Const. Co.*, 941 F.2d at 925 (A36).

Having held the Ordinance to be unconstitutionally overbroad, the court should have found Coral entitled to an award of damages, pursuant to 42 U.S.C. §§ 1983 and 1981 and attorney fees pursuant to 42 U.S.C. § 1988. Instead, the court remanded the case holding that Coral must first prove that it "lost its bid to a business which King County should not have considered" (*Coral Const. Co.*, 941 F.2d at 926, 927 (A39, A40-41))--*i.e.* that the successful MBE had not previously been discriminated against in King County.

In the process, the court wrongly assumed that it had the discretion to disregard the County Council's drafting of the Ordinance. In substance, the court

rewrote the Ordinance in much narrower terms.[9] Coral was denied the guardrail contract--notwithstanding its low bid--because of the race of its owners. The court held the County's defense--its racial preference Ordinance--to be defective. The damage has been done. To allow King County to avoid the consequences of the unconstitutional enactment through a judicial narrowing of the Ordinance goes

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[9] The definition of "Minority Business" in King County Ordinance § 4.18.010 S. (A77), reads as follows:

> "'Minority Business,' means a business certified by the Office of Minority and Women's Businesses of the State of Washington as a minority business enterprise which is legitimately owned and controlled by a minority person or persons as defined in this section. The director of the department of executive administration is authorized to determine that specific racial groups have not been discriminated against in their ownership and operation of particular trades or areas of business or *in the particular geographical areas in which they operate.* The director may exclude such businesses from consideration as "minority businesses" under this chapter, in connection with contracts involving such trades or areas of business, as provided in Section 4.18.080 of this chapter."

The italicized language was found on its face to give a preference to contractors who may have experienced no discrimination in King County. 941 F.2d at 925 (A36).

well beyond merely giving the Ordinance a saving construction.

There is no ambiguity on the coverage question. The ordinance, which incorporated the statewide MBE certification process, cannot realistically be interpreted as applicable only to past participants in the King County market. *See* n.9 *supra*. Such a result can be accomplished only by judicial legerdemain, not an available means for seeking to achieve such an end. *See e.g., Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (a court may construe a statute to save its constitutionality, but cannot "usurp the policymaking and legislative functions of duly elected representatives"). Thus, the proper--indeed only[10]--course available to the Ninth Circuit was to declare the Ordinance unconstitutional (*Aptheker v. Secretary of State*, 378 U.S. at 515), and to remand for the sole purpose of determining the amount of the damages due Coral.

This second error in the remand order is essentially the same as the lower court's first error in remanding to consider after-developed evidence. The

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[10] Severance is unavailable as a method of salvaging an overbroad statute, at least when deleting language in the defective section (4.18.010 S.) cannot rectify the overbreadth. *See e.g., National Advertising Company v. Town of Niagra*, 942 F.2d 145 (2d. Cir. 1991) (rejecting district court's attempt to save portions of billboard statute by excision); *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991) (remanding to district court to determine if minor's consent provision could be severed).

courts are no more empowered to reconfigure an ordinance's reach, so as to provide for coverage distinctly different from the sweep of the legislators' pen, than they are permitted to create "legislative history" out of evidence neither before, nor considered by, the enacting legislative body. These are not functions to be assumed by an overreaching judiciary, no matter how well intended its motives. These functions are the province of the elected legislative bodies, whose job it is to weigh the various policy considerations and craft laws responsive to public needs and concerns within constitutional guidelines.[11] *See United States v. Robel*, 389 U.S. 258, 267 (1967); *Freedman*, 380 U.S. at 60; *Hill v. Wallace*, 259 U.S. 44, 70 (1922); *and see* pp. 10-12, *supra*.

There is particular reason to adhere to these lines of responsibility in the instant case, since it is a *federal* court interfering with a *local* ordinance. As already indicated (*see* pp. 12-13, *supra*), the venerated principle of federalism cautions against such judicial intrusiveness. *See National Advertising Company*, 942 F.2d at ___, 1991 U.S. App. Lexis 19008, 19 (1991) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491,

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[11] This Court's prior decisions mandate a two-part process to sustain a race conscious preference. The legislature must first identify and measure the prior harm, and then it must fashion an appropriate remedy "narrowly tailored" to the harm. *Croson*, 488 U.S. at 507; *Wygant*, 476 U.S. at 277, 280 (Powell, J., plurality opinion); *see also Valentine*, 654 F.2d at 508. In the end, the Ninth Circuit assigned both of these functions to the judiciary.

508 (1985) (O'Connor, J., concurring)); *see also Hynes*, 425 U.S. at 622 (declining to limit city ordinance); *Smith v. Goguen*, 415 U.S. 566, 575, (1974) (declining to narrow state statute absent state court interpretation); *Welsh v. United States*, 398 U.S. 333, 363 n.15 (1970) (noting Court's limited discretion in setting state policy).[12]

CONCLUSION

The Court of Appeals erred in directing the district court to reconsider the constitutionality of a local racial preference ordinance, in the light of post-enactment evidence never considered by the legislature when the set-aside program was originally enacted. That error was compounded by instructions on remand for the district court to consider petitioner's claim for damages under the provisions of

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[12] The court below misread *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), as supporting its remand to the district court for consideration of damages under the more "narrowly tailored" coverage crafted by the Ninth Circuit. *Coral Const. Co.*, 941 F.2d at 921. In *Bakke*, 438 U.S. at 320 n.54, Justice Powell made clear that to apply the *Mount Healthy* principle in such circumstances where, as here, there exists no evidence that the legislative decision was dependent on "mixed motives" (both good and bad)--*see, e.g.*, pp. 18-19, *supra*--would be to engage in a "fictitious recasting of past conduct." The relevant question is whether the petitioner suffered injury (*i.e.*, denial of a county contract) due to race, and not whether King County could have drawn a preference program in a narrowly tailored, constitutional manner.

an ordinance that exists only in the court's mind. This Court's ruling in *Croson* assigns fact finding and narrow tailoring to the legislative bodies that enact race conscious legislative programs. To blink at this Court's prior allocation of responsibility undercuts its prior decisions, runs counter to traditional understandings of federalism, breaks with other circuit and district courts and sows seeds of confusion regarding when, where and by whom the lines of racial legislation should be drawn, if at all. The issue is an important and timely one that deserves plenary review by this Court.

Accordingly, we urge that the instant petition for a writ of certiorari be granted and this matter be heard by the full Court.

Respectfully submitted,

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November 5, 1991

91-755

Supreme Court, U.S.
FILED
NOV 5 1991
OFFICE OF THE CLERK

NO. _____

In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-35066
CT/AG#: C89-1488WD

CORAL CONSTRUCTION COMPANY, an Oregon corporation, and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., an Oregon non-profit corporation,

Plaintiffs-Appellants,

v.

KING COUNTY, a legal subdivision of the State of Washington,

Defendant-Appellee.

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; NORTHWEST WOMEN'S LAW CENTER, ASSOCIATION OF WOMEN CONTRACTORS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Amici Curiae

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Filed and entered AUGUST 8, 1991

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORAL CONSTRUCTION COMPANY, an Oregon corporation; and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., an Oregon non-profit corporation,	)	No. 90-35066
Plaintiffs-Appellants,	)	
v.	)	
KING COUNTY, a legal subdivision of the State of Washington,	)	
Defendant-Appellee.	)	

O'SCANNLAIN, CIRCUIT JUDGE:

We must decide whether King County's Minority- and Women-Owned Business Enterprise set-aside program for public contract awards violates the equal protection clause of the fourteenth amendment.

I

In 1981, King County, Washington (which encompasses the city of Seattle) implemented a program establishing a preference for the use of minority-owned businesses (MBEs) and women-owned businesses (WBEs)[1] in letting county contracts or subcontracts.[2] *See* King County, Wash., Code ch. 4.18. Following the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), King County amended the MWBE program in an effort to comply with the dictates of Croson. *See* King County, Wash., Ordinance 8937 (May 1, 1989). It is under this amended version of the ordinance that the events at issue here transpired.[3]

Under the County's program as amended, a "minority business" is one certified by the State of Washington as being legitimately owned and controlled by a minority person or persons. King County,

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[1] Minority-owned and women-owned businesses are referred to collectively as "MWBEs."

[2] Contracts coming within the program's purview include architectural and engineering contracts, concession contracts, construction contracts, consultant contracts, and purchasing and service contracts. *See* King County, Wash. Code ch. 4.18.030.

[3] As will be noted later, the ordinance was again amended on August 29, 1990. Unless otherwise specified, references to the county ordinance are to the pre-1990 version of the ordinance.

Wash., Code §§ 4.18.010(S). The term "minority" includes blacks, Hispanics, Asian-Americans, American Indians, and Alaskan natives. *Id.* at § 4.18.010(T). A "women's business" similarly must be certified by the state. *Id.* at § 4.18.010(HH).

The MWBE program provides two methods by which MWBEs may receive preferences in bidding on county contracts. For county contracts of $10,000 or less, the "percentage preference method" gives a contract bidder who is an MWBE or will use MWBEs on the project a preference if its bid is within five percent of the lowest bid. *See id.* at § 4.18.060(A)(1). For county contracts of more than $10,000, the "subcontractor set-aside method" applies, under which the successful contractor must use MWBEs for a prescribed percentage of the work performed on the contract. *See id.* at § 4.18.060(A)(2). The actual percentages of required MWBE participation are individually determined on an ad hoc basis, according to the availability of qualified MWBEs. *See id.* at § 4.18.060(A)(2)(a).

The program permits a reduction in the amount of set-aside levels for a given contract if it is not feasible to meet higher levels, qualified MWBEs are unavailable, or MWBE price quotes are not competitive. *See id.* at § 4.18.060(B). Likewise, the percentage preference method can be used for county contracts exceeding $10,000 if this alternative is a "more feasible method of achieving" the MWBE utilization goal. *Id.* at § 4.18.060(C). Finally, in certain

circumstances, all or portions of the MWBE program may be waived entirely. *See id.* at § 4.18.070(A) (waiver available where a non-MWBE is the sole source of a good or service, where no MWBE is available or competitively priced, and where the contract is awarded to certain governments or non-profit groups).

On September 28, 1989, bids were opened for a county contract to install guardrails along various county roads. Coral Construction Company ("Coral Construction"), an Oregon firm with a branch office in King County, was the low bidder at $178,100. However, utilizing the "percentage preference method," the County awarded the contract to Dirt & Aggregate Interchange, Inc. ("Dirt & Aggregate"), an Oregon-based MBE which submitted a bid of $185,153.50. Thereafter, Coral Construction and the Oregon-Columbia chapter of the Associated General Contractors of America, Inc. ("OCAGC"), brought this suit in the United States District Court for the Western District of Washington, alleging that King County's MWBE program, on its face and as applied to Coral Construction, violated the Constitution's equal protection clause and federal civil rights statutes, 42 U.S.C. §§ 1981 & 1983. Plaintiffs requested damages, injunctive and declaratory relief, and attorney's fees.

In the district court, both sides filed cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, each asserting that no disputed facts existed. On December 4, 1989, the

district court granted King County's motion for summary judgment and denied the motion of Coral Construction and OCAGC. *See Coral Construction Co. v. King County*, 729 F Supp 734 (W.D. Wash. 1989). The court concluded that King County's MWBE program was constitutional because the County had compiled a sufficient record of redressable discrimination against minorities and women, and had narrowly tailored its remedial measures.

Notwithstanding its victory in the district court, King County amended its MWBE program yet again. *See* King County, Wash., Ordinance 9609 (August 29, 1990). Specifically, the amendments, enacted on August 29, 1990, incorporated two consultant reports into the record underlying the MWBE program. The first study, prepared by Perkins Coie (and hereinafter referred to as the Perkins Coie Consultant Study), documents through statistics and anecdotal evidence the impact of discrimination in the local construction, architecture, and engineering fields. The second study, conducted by the Washington Consultant Group, focused on discrimination in the local goods and services industries. The two studies cost approximately $411,000 and were paid for by several local agencies. King County contributed $95,000.

The mechanics of the MWBE program were also altered by the August 29, 1990 amendments. The "percentage preference" method for allocating set-asides was modified; rather than using a fixed five-percent preference, a flexible-percentage preference

was employed, the percentage to be determined on a case-by-case basis. In addition, under the amended version of the program, *all* prime contractors, even those that are themselves women- or minority-owned, are required to employ minority- and women-owned subcontractors, unless the prime contractor itself will perform twenty-five percent or more of the contract. Finally, the new ordinance requires the County's Office of Civil Rights and Compliance to monitor the effects of the MWBE program to ensure that it does not disproportionately favor a particular racial or ethnic group, and that it does not remain in force longer than is necessary to offset the effects of prior discrimination.

Coral Construction and OCAGC[4] appeal the district court's grant of summary judgment for King County. King County has moved for partial dismissal of this appeal, asserting that the plaintiffs' request for injunctive and declaratory relief is now moot as a result of the August 1990 amendments.

The district court had subject matter jurisdiction to hear this matter under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4). This court has jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment de novo. *See Columbia Pictures Indus. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279 (9th Cir. 1989).

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[4] Hereinafter the two plaintiffs will be referred to collectively as "Coral Construction."

II

We begin by examining the minority set-aside (MBE) component of King County's program. Coral Construction seeks damages, as well as injunctive and declaratory relief. To determine if Coral Construction is entitled to damages, we must review the ordinance as it existed at the time of Coral Construction's purported injury. Accordingly, we review the MBE program as amended on May 1, 1989, but prior to the August 29, 1990 amendments, for all purposes.

A

In *Croson*, the Supreme Court definitively decided that a governmental actor's use of racial classifications, including classifications that appear to be facially benign, are subject to strict judicial scrutiny. *Croson*, 488 U.S. at 493 (plurality); *id.* at 520 (Scalia, J., concurring);[5] *See also Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir.) (hereinafter *Hillsborough County*) ("When reviewing the constitutionality of [an MBE], courts apply strict

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[5] The number of Justices joining Justice O'Connor's opinion in *Croson* varied from part to part. Five Justices joined parts I, IIIB, and IV of the opinion; hereinafter, these sections shall be designated as "majority." Justice O'Connor garnered four Justices for parts IIIA and V; these sections shall be referred to as "plurality." Finally, three Justices joined part II of the opinion; citation to this part of the opinion shall so reflect.

scrutiny," citing *Croson*), *cert. denied*, 111 S. Ct. 516 (1990). Such strict scrutiny, in turn, has two elements: for an affirmative action program to survive such scrutiny, there must be a compelling governmental interest in employing a racial classification, and the classification must be narrowly tailored to achieve the compelling interest. *Croson*, 488 U.S. at 493-94; *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality).

The *Croson* Court applied the strict scrutiny test to an MBE program very similar in purpose to that enacted by King County. Thus, the conclusions in *Croson* are dispositive as to many aspects of the King County program. There are, however, important substantive differences between the two programs. The *Croson* Court ruled upon a minority set-aside program that expired by its own terms months before its constitutionality was even argued in the Supreme Court. As a result of *Croson's* static posture, the Supreme Court failed to address many of the procedural accoutrements that necessarily accompany strict scrutiny review of such programs, particularly those programs, such as we are faced with here, whose vitality remains during the pendency of the judicial process. We shall review the merits of King County's MBE program with these differences in mind.

B

We begin with the "compelling government interest" component of the strict scrutiny test.

1

The *Croson* Court identified several factors suggesting the existence of a compelling governmental interest. First, a set-aside program is valid only if actual, identifiable discrimination has occurred within the local industry affected by the program. "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." *Croson*, 488 U.S. at 499-501.

Second, the governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program. However, the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review. *See id.* at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.). Mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong. *See id.* ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all

citizens, do not serve to finance the evil of private prejudice.").[6]

2

As a threshold matter, Coral Construction contests King County's use of, and the district court's reliance upon, information compiled by the City of Seattle, the Port of Seattle, the Municipality of Metropolitan Seattle ("Metro"), and Pierce County, Washington. In *Croson*, the Supreme Court declared: "We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." 488 U.S. at 505. This prohibition, Coral Construction reasons, requires the County to compile the record on its own; any sharing of data is strictly prohibited.

Resolution of this case requires a more searching inquiry into the reasons underlying the Supreme Court's statement. Data sharing presents the risk that data of "societal discrimination" will become the factual basis for an MBE program. This is

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[6] In *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), we held that "[a]t a minimum, the state or local government must be acting to remedy government-imposed discrimination, perpetuated by it or by one of its departments or divisions." *Id.* at 930 (footnote omitted). We agree with the district court that *Croson* implicitly overruled - or, at the very least, construed broadly - this portion of *Associated General Contractors*. *See* 729 F. Supp. at 737-38.

impermissible. *See id.* at 496-97 (plurality) (societal discrimination alone cannot justify race-conscious programs); *id.* at 526 (Scalia, J., concurring in the judgment). Similarly, race-conscious programs must be designed to minimize - if not avoid - burdens upon nonculpable third parties. *See United States v. Paradise*, 480 U.S. 149, 183 (1987) (plurality) (race-conscious decree "does not disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals"). If an MBE program is based on outside data, it is possible that innocent third parties - residents of the jurisdiction covered by the program but not shown to have engaged in discriminatory activity - might be unnecessarily burdened.

Here, the City of Seattle, Port of Seattle, and Metro are either completely within or coterminous with the boundaries of King County. The data from these jurisdictions is, almost by definition, relevant to the question of discrimination within the County. Likewise, the risk of unfairly burdening innocent third parties is not present. Accordingly, the data from these three jurisdictions was properly considered by both the County and the district court.

In contrast, Pierce County is a completely separate jurisdiction from King County. It is, however, immediately adjacent to King County and is part of the same metropolitan area. Likewise, the world of contracting does not conform itself neatly to jurisdictional boundaries. In this regard, contracting differs markedly from a school system, which conducts

its business in relative isolation from other school systems. *Cf. Milliken v. Bradley*, 418 U.S. 717 (1974). For these reasons, amici National Association for the Advancement of Colored People and the Northwest Women's Law Center argue that evidence of discrimination in Pierce County is indeed probative of discrimination within King County.

It is true that the Pierce County data has some probative value regarding discrimination within King County. Conversely, much of it is irrelevant. While some Pierce County developers and contractors undoubtedly seek business in both jurisdictions, many would not. It is vital that a race-conscious program align itself as closely to the scope of the problem legitimately sought to be rectified by the governmental entity. To prevent overbreadth, the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries. Given the risk of unnecessary overlap, the district court properly excluded the Pierce County data from consideration.

3

(a)

With or without the Pierce County data, Coral Construction contends that the record is insufficient to support King County's program. Undeniably, the record in the present case is considerably more extensive than that compiled by the Richmond City

Council in *Croson*. In particular, the 700-plus page record contains the affidavits of at least 57 minority or women contractors, each of whom complains in varying degree of specificity about discrimination within the local construction industry. The affiants reflect a broad spectrum of the contracting community; the breakdown is roughly as follows:

Black Contractors 23

Hispanic Contractors 13

Asian Contractors 10

Native American Contractors 6

Women Contractors[7] 3

Other[8] 2

These affidavits certainly suggests that ongoing discrimination may be occurring in much of the King County business community. Many complain of being unable to obtain contracts for private sector work. Barbara H. Pool, president of Seaway Construction

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[7] The record contains far more than three affiants from women-owned contractors; however, many of the other women were also minority, and attributed any hostility to race-based factors.

[8] One individual hailed from the country of India, and another identified himself only as a "minority."

Inc. in Seattle, testified: "I believe the refusal of prime contractors, developers and architects to award contracts to my business for private sector work is due to discrimination against minority persons and minority-owned businesses generally." Likewise, David A. Zuluaga, president of D.A. Zuluaga Construction Inc. in Seattle, wrote:

> "I have tried repeatedly in the past to obtain contracts and subcontracts on private construction contracts and have been unsuccessful. I know from my eleven years of experience in the construction industry that my businesses's prices are competitive with nonminority businesses' prices and that my business performs as high quality work as nonminority businesses. Nonetheless, when I have submitted bids to prime contractors for work on private projects or when I have attempted to negotiate contracts with these persons, I have been refused the right to participate in the projects."

The complaints extend to subcontracting awards on public projects. Mark W. Robison, president of Robison Construction Inc. in Auburn, Washington, averred: "We recently were in line to receive the site work contract for the King County Goodwill Games Pool Project, and were bypassed for a non-minority firm when King County relaxed their requirements for

MBE participation." Similarly, Charles D. de Montigny, president of de Montigny Engineers Inc., declared that he has heard comments like "[t]here is no minority requirement on this project, so we are going to use someone else."[9]

Notably absent from the record, however, is any statistical data in support of the County's MBE program. The Supreme Court has suggested on several occasions that a statistical comparison is an invaluable tool with which to evaluate an affirmative action program. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Court stated:

> "[O]ur cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those

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[9] It is worthy of note that the MBE program may be having some of its desired effects. Mr. de Montigny averred:

> There is a general perception that minority firms don't really know what they are doing. However, the MBE set-asides have made some progress in that area. I have had some repeat customers as a result of my first contract being a minority set-aside.

> in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination.

Id. at 339 (citations, quotation, and footnote omitted). Indeed, the Court has held that, for purposes of Title VII, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *see also Croson*, 488 U.S. at 501 (same, quoting Hazelwood). In decisions since *International Brotherhood* and *Hazelwood*, the Supreme Court has focused its attention on delineating the proper methods for interpreting statistical data. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (holding that, as a general rule, the failure to include variables in a regression analysis affects only the probativeness of the analysis, not its admissibility); *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (holding that where a job requires special training, appropriate statistical comparison should be with those in the labor force who possess the necessary qualifications); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989) (holding that the proper statistical analysis is between the racial composition of qualified persons in the labor market and the persons holding the jobs at issue).

Of course, statistics, standing alone, must be analyzed carefully. *See Forsberg v. Pacific Northwest*

Bell Tel. Co., 840 F.2d 1409, 1418 (9th Cir. 1988). In *International Brotherhood*, the Supreme Court warned: "[S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 431 U.S. at 340. Statistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Cf. Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464-65 (9th Cir.), *cert denied*, 484 U.S. 853 (1987).

Unlike the cases resting exclusively upon statistical deviations to prove an equal protection violation, the record here contains a plethora of anecdotal evidence. However, anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *See Penk*, 816 F.2d at 463-64.

Nonetheless, the combination of convincing anecdotal and statistical evidence is potent. In *International Brotherhood*, the Court conceded for purposes of argument that "statistics alone" could not support the finding of discrimination, but observed

that "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." 431 U.S. at 339. Similarly, the Eleventh Circuit, in passing upon a minority set-aside program similar to that here, concluded: "The testimony regarding . . . complaints [of discrimination], combined with the gross statistical disparities uncovered by the County studies, provides more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a motion for summary judgment." *Hillsborough County*, 908 F.2d 908 at 916.

Here, the MBE program cannot stand without a proper statistical foundation. Undoubtedly, the written testimony of the numerous affiants suggests that there may be a systemic discrimination within the King County construction industry. Without a statistical foundation, the picture is incomplete. Strict scrutiny demands a fuller story. Not enough has been told so far to meet King County's burden that its program passes the "compelling governmental interest" requirement.

(b)

King County contends that any deficiencies in the record, such as the lack of a statistical foundation, have been remedied by post-enactment studies. Specifically, King County urges us to consider the Perkins Coie Consultant Study completed in January

1990.[10] In addition, as an exhibit to its motion for partial dismissal on mootness grounds, King County attached a second consultant study prepared by the Washington Consulting Group and released in July 1990, although the County does not otherwise urge this study upon us. Coral Construction, on the other hand, contends that neither this court nor the district court should consider any post-enactment data purportedly supporting the MBE program.

Whether post-enactment studies may be considered in reviewing an MBE program is not simply a matter of appellate procedure but rather implicates the core of the pertinent equal protection analysis. The *Croson* Court noted that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498 (majority). Similarly, we have observed that "[b]efore [a] city [may] embark[ ] on an affirmative action program, it must have convincing evidence that remedial action is warranted." *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 932 (9th Cir. 1987). Relying on these statements, Coral Construction reasons that any post-enactment data is

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[10] The study was submitted to the district court four days prior to the hearing on the parties' cross-motions for summary judgment. The court expressly did not consider the study in upholding King County's program. 729 F. Supp. at 737 n.4.

simply irrelevant. In so arguing, however, Coral Construction has collapsed two entirely independent inquiries into one.

It is true that a municipality must have some concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *See id.; see also Croson*, 488 U.S. at 509 (plurality) ("If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion."). Race-based classifications must be reserved strictly for remedial settings. *Croson*, 488 U.S. at 493 (plurality); *id.* at 524 (Scalia, J., concurring in the judgment). Without any evidence of discrimination, it cannot be fairly said that the state is seeking to "remedy" a problem. Moreover, the benign nature of the classification is questionable where no evidence of discrimination has been adduced. *Cf. id.* at 493-96 (plurality). Thus, any program adopted without some legitimate evidence of discrimination is presumptively invalid.

However, this requirement of some evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. Rather, the factual predicate for the program should be evaluated based upon all evidence presented to the district court,

whether such evidence was adduced before or after enactment of the MBE.

This rule - that a municipality have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program - is not a facile legal distinction. Rather, this rule recognizes the seemingly conflicting demands sometimes placed upon a state or municipality by the Constitution. "[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Id.* at 518 (Kennedy, J., concurring) (emphasis added); *see also Associated General Contractors*, 813 F.2d at 929 ("a state or its political subdivision has the authority - indeed the constitutional duty - to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps") (emphasis in original; quotation and citations omitted). The remedy for intentional discrimination often calls for race-specific relief. *See United States v. Paradise*, 480 U.S. 149, 166 (1987) (plurality) ("It is now well established that governmental bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."); *Croson*, 488 U.S. at 524 (Scalia, J., concurring in the judgment). A state or municipality, when presented with evidence of its own culpability in fostering or furthering race

discrimination, might well be remiss if it failed to act upon such evidence. Thus, a municipality having such evidence would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably. The rule we articulate today lessens the likelihood of such dilemmas.

This rule also comports with the Supreme Court's analysis set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977) and *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977). In *Arlington Heights*, the Court concluded that proof that a zoning ordinance was motivated in part by a racially-discriminatory purpose would not necessarily require invalidation of the ordinance. Rather, such proof merely shifted the burden to the municipality to show that it would have enacted the ordinance in the absence of the improper purpose. 429 U.S. at 270 n.21. Likewise, in *Mount Healthy*, the Court held that a public employee fired for, inter alia, exercising his First Amendment rights did not have a cause of action for damages where the employer proved that the employee would have been terminated anyway. 429 U.S. at 285-86. Here, our analysis is similar; we will not invalidate an MBE program due to an inadequate record where an adequate factual predicate is subsequently proven.

A race-conscious remedy without a race-based injury is constitutionally infirm. *Croson*, 488 U.S. at 499-502 (majority). For this reason, a remedy without any evidence of a violation is presumptively void. However, where a state has a good faith reason to believe that systemic discrimination has occurred, and is continuing to occur, in a local industry, we will not strike down the program for inadequacy of the record if subsequent factfinding bears out the need for the program. In other words, a plan will not be invalidated solely because the record at time of enactment did not measure up to constitutional standards.[11]

(c)

Alternatively, Coral Construction argues that even if the consulting studies are relevant, this court should not consider them in the first instance. Rather, Coral Construction contends that it should first be given an opportunity to challenge the studies in the district court.

This point is well taken. As previously noted, statistics are not irrefutable, and may be rebutted. *See International Brotherhood*, 431 U.S. at 340. Such rebuttal

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[11] Of course, the municipality that adopts such a program without a complete record bears the risk that a fuller development of the facts will not support the need for the program, or that the program might not be narrowly tailored.

comes in two guises. First, rebuttal evidence may consist of a neutral explanation for the statistical disparities. *See Penk*, 816 F.2d at 464. Also, the rebutting party may wish to attack the statistics themselves. This may be accomplished by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data. *Id.* Coral Construction should have "its day in court" and the opportunity to attempt such a rebuttal. It would be inappropriate to consider the consultant studies for the first time on appeal. Since Coral Construction has not yet been accorded its opportunity for rebuttal before the trier of fact, we must reverse the grant of summary judgment to King County as to the MBE program.

We, therefore, remand this matter to the district court for determination of whether the consultant studies provide adequate factual justification to establish a "compelling government interest" for King County's adopting the MBE program.

4

Coral Construction maintains that even if discrimination does exist within the King County business community, there is insufficient evidence of governmental involvement to warrant an MBE program. We disagree. *Croson* does not require a showing of active discrimination by the enacting

agency; passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Croson*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."). In fact, the *Croson* Court concluded: "If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion." *Id.* at 509 (plurality). Here - assuming that the record adequately supports a finding of systemic discrimination - the County has adequately limited its program to those businesses that receive tax dollars; indeed, the program imposes obligations upon only those businesses which voluntarily seek King County tax dollars by contracting with the County.

C

We turn next to the "narrow tailoring" prong of strict scrutiny review. We note at the outset that our analysis will necessarily be limited, given that the factual predicate for the program has not been fully developed or litigated before the district court. However, since Coral Construction may be entitled to judgment if the MBE program is constitutionally infirm in any manner, we shall conduct a brief examination of the program to determine if the

program is flawed even before resort to the record is necessary.

The Supreme Court has identified several characteristics of a set-aside program which would suggest that a program was adequately restricted to remedying only prior discrimination within the jurisdiction. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 507 (majority). The second characteristic of a narrowly-tailored program is the use of minority utilization goals set on a case-by-case basis, rather than upon a system of rigid numerical quotas. *See id.* at 507-08 (majority). Finally, an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *See id.* at 491-92 (O'Connor, J., joined by Rehnquist, C.J., and White, J.). Each of these characteristics will be considered in turn.

1

Among the various narrow tailoring requirements, there is no doubt that consideration of race-neutral alternatives is among the most important. The reasons for this are numerous. First, race-neutral alternatives enable government to increase minority participation in an affected industry without a corresponding stigma. *Id.* at 493 (plurality) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for

remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *id.* at 516-17 (Stevens, J., concurring) ("Although [a race-based affirmative action program] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries."). Many of the barriers to minority business participation are the product of factors other than race.[12] While there can be no doubt that one reason that minority-owned and operated construction firms tend to be less established than non-minority owned or operated firms is prior society-wide discrimination, many of the problems caused by the relative youth of minority-owned firms can be resolved without resorting to stigmatizing and fractionalizing racial classifications.

Likewise, a well-conceived race-neutral alternative ensures that the minority beneficiaries of the program are more likely to be the true victims of discrimination; such a program prevents a race-conscious program that merely acts as a windfall to previously established minority firms. *See id.* at 508

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[12] In fact, many of the barriers facing minority businesses are typical of those facing any entrepreneur whose business is in its infancy. We note in passing that to the extent that the sole barrier to minority business participation is that faced by all new businesses, regardless of ownership, an MBE program cannot stand. Only upon showing of actual discrimination may a state or municipality enact a race-based remedial program.

(majority) ("Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race.").

Nevertheless, while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. We stated in Associated General Contractors that "[w]e . . . read the admonition that only a 'limited and properly tailored remedy' may be adopted as requiring exhaustion of more neutral measures before resorting to race-conscious ones." 813 F.2d at 939 (citation and footnote omitted). However, we did not intend that a government entity exhaust every alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. Indeed, the footnote immediately following this statement suggests that some degree of practicality is subsumed in the exhaustion requirement: "The [Human Rights Commission] report suggests that race-neutral measures can be effective. . . . Such measures also appear to be working well in Santa Clara, a community near San Francisco." *Id.* at 939 n.36. Thus, *Associated General Contractors* requires only that a state exhaust race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. Here, the record reveals that the County considered alternatives, but determined that they were not available as a matter

of law. *See* Rev. Code of Wash. § 39.08.015 (restricting ability of counties to avoid bonding requirements); Wash. Const., art. 8, sec. 7 (prohibiting county or city from extending credit to businesses). The County cannot be required to engage in conduct that may be illegal; nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best.[13]

Moreover, the record shows that King County has adopted some race-neutral measures in conjunction with the MBE program. For example, the County annually hosts one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. In addition, the County provides information on accessing small business assistance programs. Inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *See Hillsborough County*, 908 F.2d at 916 n.11 ("While the *Croson* Court referred to these measures as alternatives to MBE plans, inclusion of such measures in an MBE plan would lend to the plan's flexibility."). King County

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[13] Coral Construction faults King County for failing to lobby the state legislature to amend or repeal section 39.08.015. This criticism is meritless. A legislative entity considering an MBE program is only required to exhaust race-neutral alternatives that are legitimately within the authority of the entity to enact. Pleading with superior legislative bodies for expanded authority is not such a required alternative.

has fulfilled its burden of considering race-neutral alternative programs.

2

A second indicator of a program's narrow tailoring is program flexibility. An important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *See Croson*, 488 U.S. at 507-08 (majority); *see also Hillsborough County*, 908 F.2d at 916-17. The Richmond program was fatally flawed because of its use of a rigid 30% quota for each city contract. *See Croson*, 488 U.S. at 507. Such a quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* Case-by-case utilization goals are, however, "less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration." *Id.* at 508. Moreover, such individualized procedures insure that the beneficiaries of such preferential treatment are those "who truly have suffered the effects of prior discrimination." *Id.* Minority set-aside programs are not to be windfalls for otherwise successful minority contractors who have either overcome or otherwise not felt the sting of discrimination in the relevant locality.

In this respect, King County's program does not suffer from the rigidity that plagued the Richmond program. Under the "set-aside" method, the prescribed percentage of MBE subcontractor participation is determined individually on each contract according to the availability of qualified MBEs. *See* King County, Wash. Code § 4.18.060(A)(2)(a). The "percentage preference" method, used predominantly for contracts under $10,000, is simply not a quota, as no MBE will receive the relevant contract if its bid is not within the prescribed preference. While the preference is locked at five percent, such a fixed preference is not unduly rigid, particularly in light of the waiver provisions discussed below.

A valid MBE program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *See Croson*, 488 U.S. at 508. King County's program provides for waivers in both instances. *See* King County, Wash., Code § 4.18.070(A)(3) (waiver available where "neither a minority nor a women's business is available to provide needed goods or services"); *Id.* at § 4.18.070(A)(5) (waiver available "[w]hen available minority and/or women's businesses have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination").

Similarly, in *Hillsborough County*, the Eleventh Circuit identified several other attributes of a narrowly tailored and flexible MBE. *See* 908 F.2d at 916-17. First, no goal could ever exceed fifty percent MBE participation. *Id.* Second, a low bidder who does not meet plan goals may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* Finally, a low bidder may still receive a contract, even in the absence of good faith efforts to comply, if the next lowest bid is either $100,000 or fifteen percent higher than the low bid. *Id.*

King County's program mirrors that of Hillsborough County in many respects. As in *Hillsborough County*, not only are the actual percentages of required MBE participation determined on a case-by-case basis, but set-aside levels may be further reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. King County, Wash. Code § 4.18.060(B). Complete waiver of set-aside requirements is permitted if a non-MBE is the sole source of a good or service, or if no MBE is otherwise available or competitively priced. *Id.* at § 4.18.070. Finally, when the preference method is employed, a non-MBE will be awarded the contract if it is the lowest bidder and no MBE is within five percent of the low bid. *Id.* at § 4.18.060(A)(1). King County's MBE program is not facially unconstitutional for want of flexibility.

3

An MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. "[A] state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." *Croson*, 488 U.S. at 491-92 (O'Connor, J., joined by Rehnquist, C.J., and White, J.); *cf. id.* at 524 (Scalia, J., concurring in the judgment) ("In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."). The task of remedying society-wide discrimination rests exclusively with Congress. *See id.* at 490; *see also Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3008 (1990); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir.) ("The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do."), *cert. denied*, 111 S. Ct. 2261 (1991).

King County's MBE program fails this third portion of the "narrow tailoring" requirement. The program's definition of "minority business" indicates that a minority-owned business may qualify for preferential treatment if the business has been

discriminated against "in the particular geographical areas in which [it] operate[s]." *See* King County, Wash., Code § 4.18.010(S). This definition is overly broad. Since the County's interest is limited to the eradication of discrimination within King County, the only question that the County may ask is whether a business has been discriminated against *in King County.*

Thus, in the case at bar, it is of no moment that the successful bidder, Dirt & Aggregate, has its principal place of business in Troutdale, Oregon. The question is not one of business location, but of business participation. Indeed, an MBE headquartered in Seattle might not be eligible for preferential treatment, whereas a similar business located in Miami might. In order for an MBE to reap the benefits of King County's MBE program, it is necessary to determine if the company has ever been victimized by discrimination within King County.

This determination is not an insurmountable burden for the County, as the rule does not require a finding of specific instances of discriminatory exclusion for each MBE. Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously

sought to do business in the County.[14] However, if the MBE was a newcomer to King County, or otherwise was untarnished by the systemic discriminatory practices, then it may not benefit from the MBE program. In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. Since King County's program permits MBE participation even by MBEs who have no prior contact with King County, the program is overbroad to that extent.[15]

The grant of summary judgment to King County on the MBE program must be reversed on grounds of overbreadth as well.

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[14] We use the word 'presumptively' advisedly, for we do not wish to foreclose the possibility that the presumption might be overcome in a proper case.

[15] The majority in *Croson* did object to the Richmond plan because, among other things, "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors." 488 U.S. at 508 (majority). However, we do not believe that the Court meant to say that the inquiry must be more specific than what we have outlined here.

D

Having concluded that the MBE portion of the King County program (as it stood in September 1989) is constitutionally defective, at least in part, we must next determine whether our conclusions entitle Coral Construction to an award of damages. Coral Construction has pleaded two claims upon which such relief may be granted - 42 U.S.C. § 1981 and 42 U.S.C. § 1983. We consider each in turn, beginning with Section 1983.

1

Section 1983 provides a private cause of action for deprivations of federal rights under color of state law. *Meyerson v. State of Arizona*, 709 F.2d 1235, 1238 (9th Cir. 1983), *vacated on other grounds*, 465 U.S. 1095 (1984). Section 1983 "was intended to create a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quotations omitted). Actions taken pursuant to a municipal ordinance are made "under color of state law" sufficient to trigger potential liability. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978).

Of particular import here is Section 1983's causation requirement. "[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of

constitutional rights. . .." *Carey*, 435 U.S. at 254. "[D]amages are available under that section for actions found to have been violative of constitutional rights *and to have caused compensable injury*." *Id.* at 255 (emphasis in original; quotation omitted); *see also Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977) (finding causation to be element of a claim for wrongful termination based upon exercise of First Amendment rights).

Here, our review of King County's MBE program must be inconclusive. We have identified one specific provision of the program which is facially violative of the equal protection clause: the scope of King County's program covers a broader geographic scope than the County is authorized to consider. Nonetheless, we cannot determine whether this violation entitles Coral Construction to an award of damages, as the record does not indicate whether Coral Construction lost its bid to a business which King County should not have considered.

2

Section 1981 provides, in part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Section 1981 differs from Section 1983 in many important respects. First, Section 1981's prohibitions extend to private citizens as well as to state actors. *See Runyon v. McCrary*, 427 U.S. 160, 168

(1976). Moreover, section 1981 actually proscribes certain conduct, whereas section 1983 is fundamentally a jurisdictional statute. In addition, section 1981 was founded upon the thirteenth, as well as the fourteenth amendment, while the roots of section 1983 are found exclusively in the fourteenth. *See Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 721 (1989).

However, like Section 1983, section 1981 is by nature a tort remedy. *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 518 (3d Cir. 1986), *aff'd on other grounds*, 481 U.S. 604 (1987). Accordingly, it follows that causation is also an element of a Section 1981 cause of action. Even if Section 1981's remedy is not perceived as tort-like, we nonetheless have little hesitation in finding a causation requirement in the statute. Rare indeed is the civil rights remedy without such a requirement. *See, e.g., Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86 (1977) (in finding causation to be an essential part of a First Amendment claim, Court observed that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct"); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (causation is part of a prima facie Title VII case). Thus, as with its section 1983 claim for relief, Coral Construction must show a causal link between the purported violation and its injury to recover damages under section 1981. Accordingly, the district court must resolve the question of causation on remand.

E

A brief summary of our analysis and conclusions to this point may be helpful here. We have uncovered only one facial constitutional infirmity in the MBE program as it stood in September 1989: the program is geographically overbroad. However, we cannot say whether this facial infirmity should enable Coral Construction to recover damages, as the record is inadequate at present to determine whether this infirmity was the cause of Coral Construction's harm.

Nor are we persuaded that there exists a sufficiently "compelling governmental interest" to justify adoption of the County's race-conscious program. The record, as it existed in September 1989, does not support a finding of systemic discrimination within King County. Nonetheless, the subsequent consultant studies may - or may not - support such a finding. If the district court finds on remand that there was systemic discrimination within the King County business community, then the district court may go on to consider any additional questions of "narrow tailoring" that might arise from the expanded record.

III

We turn next to Coral Construction's request for injunctive and declaratory relief regarding the MBE program. This, of course, requires us to consider King County's motion for partial dismissal of this

appeal. King County contends that as a result of the August 29, 1990, amendments to the MWBE program, Coral Construction's request for declaratory and injunctive relief is moot. In opposition to King County's motion, Coral Construction claims that the 1990 amendments addressed only a few of its numerous objections to the MWBE program, that the amendments are in any event cosmetic, and finally, that the amendments have not "completely and irrevocably eradicated the effects" of the alleged constitutional violation. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (case is moot if there is no reasonable expectation that alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation).

Ordinarily, a contention of mootness must be resolved as a threshold matter, since the court would lack jurisdiction to decide a moot case. *See Koppers Indus. v. EPA*, 902 F.2d 756, 758 (9th Cir. 1990). However, in cases involving the amendment or repeal of a statute or ordinance, mootness is "a matter relating to the exercise rather than the existence of judicial power." *Carreras v. City of Anaheim*, 768 F.2d 1039, 1047 (9th Cir. 1985) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Simply put, mootness here is not a jurisdictional issue; rather, we may continue to exercise authority over a purportedly moot case where the balance of interests

favors such continued authority.[16] The party moving for dismissal on mootness grounds bears a heavy burden. *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982). Moreover, voluntary cessation of allegedly illegal conduct, standing alone, does not necessarily render a case moot. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

One factor to consider in deciding if a case is moot as a result of subsequent statutory amendments is whether the governmental entity is likely to reenact the offending provision. *See Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989). However, even if the government is unlikely to reenact the provision, a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision. *See City of Mesquite*, 455 U.S. at 289 n.10 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). This principle is illustrated by *City of Mesquite* and *Carreras*. In each of these two

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[16] That Coral Construction has sought damages does not alter our analysis. Obviously, Coral Construction's request for damages remains a live controversy. *Cf. Croson*, 488 U.S. at 479 n.1 ("The expiration of the ordinance has not rendered the controversy between the city and Croson moot. There remains a live controversy between the parties over whether Richmond's refusal to award Croson a contract pursuant to the ordiance was unlawful and thus entitles Croson to damages."). Nonetheless, damage claims may be parsed from requests for injunctive or declaratory relief for purposes of mootness analysis. *See Wilson v. Nevada*, 666 F.2d 378, 383 (9th Cir. 1982).

cases, the district court had enjoined, at least in part, the challenged ordinance. Nonetheless, the Supreme Court noted in *City of Mesquite* that the defendants could "reenact[ ] precisely the same provision if the District Court's judgment were vacated," *id.* (footnote omitted), even though in so doing the city would be acting with the knowledge that its ordinance had been previously enjoined. Here - unlike *City of Mesquite* or *Carreras* - the district court approved of the County's ordinance. Thus, not only could the County reenact its earlier ordinance, but it could do so without the spectre of a prior finding of unconstitutionality. This factor weighs against mootness.

We thus decline to dismiss any part of this case as moot. However, we also decline to address the merits of Coral Construction's arguments. Ordinarily, when a plaintiff seeks to enjoin application of an ordinance, statute or other law, we would review the district court's holding "in light of [the] law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *see also Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1249 (4th Cir. 1991) (reviewing Maryland's MBE program as subsequently amended, citing *Diffenderfer*). However, given the unique procedural posture of this case, it would be premature to consider the present version of the ordinance prior to a ruling on the earlier version of the ordinance. We leave the question of the amended program's constitutionality

- and the corresponding question of the continued necessity for injunctive or declaratory relief - to the district court for determination on remand. *See Carreras*, 768 F.2d at 1047 n.19.

IV

Finally, we consider the gender-specific aspect (WBE) of the set-aside program. We note in passing that since the prior harm alleged by Coral Construction was a result of the MBE aspect of the MWBE program, rather than the WBE component, the only relief sought by Coral Construction regarding the WBE program is prospective or declaratory. Accordingly, we consider the program as it presently exists, rather than as it stood when the district court entered judgment. *See Diffenderfer*, 404 U.S. at 414.

A

We first consider Coral Construction's standing to challenge the WBE program. King County has not questioned the standing of either Coral Construction or OCAGC to challenge the gender-based preference. However, since standing is a jurisdictional issue, *see Coakley v. Sunn*, 895 F.2d 604, 606 (9th Cir. 1990), we may consider it nostra sponte, *see Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1399 (9th Cir. 1990); *see also Donaghy v. City of Omaha*, 933 F.2d 1448, 1455 (8th Cir. 1991) (federal courts are "under an independent obligation" to establish whether a person

has standing to challenge an affirmative action program).

Article III of the United States Constitution requires that a plaintiff allege personal injury that is fairly traceable to the defendant's purportedly unlawful conduct, and that the requested relief is likely to redress the injury. *Coakley*, 895 F.2d at 606. "That is, the litigant must allege a distinct and palpable injury to himself; that the injury is somehow directly linked to the challenged activity; and the injury is one which is apt to be redressed by a remedy that the court is prepared to give." *Id.* Here, we consider whether Coral Construction has alleged a "distinct and palpable injury." *See generally Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190 (11th Cir.) (hereinafter *Department of Transportation*) (discussing injury element of standing as applied to a challenge to an MBE program) *cert. denied*, 111 S. Ct. 2238 (1991).

Where only injunctive or declaratory relief is sought, a plaintiff must show "a very significant possibility" of future harm in order to have standing to bring suit. *See Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990). "The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 110 S. Ct. 1717, 1723 (1990) (citations omitted). Moreover, "[a] federal court is powerless to create its own jurisdiction by

embellishing otherwise deficient allegations of standing." *Id.*

Indeed, one court has held in a setting similar to the present case that a majority-owned contractor lacked standing to seek injunctive or declaratory relief regarding an MBE. *See Department of Transp.*, 921 F.2d at 1210. In *Department of Transportation*, the Eleventh Circuit considered Cone Corporation's challenge to an MBE program administered by the Florida Department of Transportation. The plaintiffs alleged that they had lost work as a result of the MBE program. However, the Eleventh Circuit observed that the plaintiffs "alleged no facts . . . to support this allegation; that is, they did not point to any specific contract they lost because the Secretary discriminated against them on account of their race." *Id.* at 1205-066 (footnote omitted). Likewise, "[t]he plaintiffs' allegations of future injury suffered the same infirmity; the plaintiffs merely concluded that, because of the Secretary's DBE requirements, 'they will be injured in their business or property.'" *Id.* The court concluded that these "bald conclusions" were insufficient to give rise to standing, and that the court would "decline to imagine an injury sufficient to give the plaintiffs standing when they have demonstrated none." *Id.* at 1210.

At first blush, one might suspect that Coral Construction's complaint suffers the same standing infirmities as that in *Department of Transportation*, in respect to its challenge of the WBE aspect of the set-

aside program. Coral Construction has not pointed to a contract lost to a woman-owned business. Moreover, the chain of events that would lead to injury here initially appears to be too speculative to give rise to standing -- Coral Construction would have to bid for another King County project, the project would have to be awarded to a woman-owned subcontractor, and Coral Construction would have to be the lowest bidder. *See id.* at 1201-04.

However, further analysis reveals the fallacy of such logic. In its amended complaint, Coral Construction alleges that "it intends to bid public contracts to be let by the defendant in the future." Unlike *Department of Transportation*, this conclusion is adequately supported by factual allegations within the complaint. Coral Construction has a branch office in King County. Coral Construction specializes in guardrail installation, highway signing, and related work, all of which is virtually the exclusive domain of public agencies. It is highly probable that Coral Construction will again bid on work let by King County.

This alone, however, is insufficient to confer standing upon Coral Construction. Coral Construction must also demonstrate imminent economic injury. *See S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 758 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991). While we conclude that Coral Construction will undoubtedly continue to bid on County projects, to presume that the company will be

the low bidder but lose the project to a WBE is too speculative to confer standing. *See Department of Transp.*, 921 F.2d at 1205-06. The question is whether Coral Construction has alleged a more certain injury than a potential lost bid.

Coral Construction alleges that "because it is not a member of the race or gender classes granted preference by the Ordinance and Chapter 4.18, it is not and will not be permitted to have its bid for such contracts considered on the same basis as those of the race and gender classes granted preferences by such provisions." In *S.J. Groves*, the Eleventh Circuit rejected such a claim as a basis for standing. 920 F.2d at 758. However, in so holding the court observed that "Groves is able to compete with other bidders on an equal basis," *id.* (emphasis in original); the MBE set-aside applied equally to all bidders. Here, this is not the case. Under the 1989 version of the WBE program, majority contractors did not enjoy an equal playing field for contracts awarded under the set-aside method, as WBE contractors were exempt from the subcontractor set-aside requirements. Perhaps more significantly, under the County program and unlike that in *S.J. Groves*, contracts to be awarded under the preference method entitled WBEs to an automatic five percent competitive advantage.

As a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but every time the

company simply places a bid. Indeed, Coral Construction suffers injury for standing purposes even when it is the successful bidder, as it must adjust its bid to reflect the fixed five-percent adjustment given to WBEs. Each bid placed by the company undoubtedly reflects the unequal competition.

Coral Construction has standing to challenge the WBE program.[17]

B

As a second threshold matter, we must determine the degree of judicial scrutiny afforded gender-conscious programs. In *Associated General Contractors*, we employed intermediate scrutiny, *see* 813 F.2d at 939, under which gender classifications are reviewed to ensure that they are substantially related to important governmental objectives, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). However, Coral Construction urges us to adopt strict scrutiny, the same standard of review applied to race-conscious programs.

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[17] Because Coral Construction has standing, we need not determine whether OCAGC has associational standing. *See Pennell v. City of San Jose*, 485 U.S. 1, 8 n.4 (1988) (concluding that since association had standing, giving Court jurisdiction, it was unnecessary to determine whether the individual litigant also had standing).

We are bound by prior decisions of our court unless the prior panel's decision is "clearly inconsistent with subsequent Supreme Court decisions." *Sheehan v. United States*, 896 F.2d 1168, 1172 n.7 (9th Cir.), *amended*, 917 F.2d 424 (1990). The *Croson* Court, of course, considered only an MBE set-aside program. However, the Court's plurality concluded its opinion by noting:

> If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Croson, 488 U.S. at 510-11 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)). Relying on this passage, Coral Construction contends that gender-based preferences should be subject to as stringent a review as those based on race.

Coral Construction bolsters its argument by noting that another circuit apparently has changed its degree of scrutiny as a result of *Croson*. In *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir.

1987), *aff'd*, 489 U.S. 1061 (1989), the Sixth Circuit employed intermediate scrutiny to review a WBE program, citing our holding in *Associated General Contractors*. However, two years later and following *Croson*, the same court seemingly applied strict scrutiny when considering a gender-based affirmative action program. *See Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) ("In order for a race or sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved, and second, the remedy adopted by the state must be tailored narrowly to achieve the goal of righting the prior discrimination."). Coral Construction urges us to follow the Sixth Circuit's lead.[18]

Finally, Coral Construction refers us to the critique of intermediate scrutiny found in *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia*, 735 F. Supp. 1274, 1302-03 (E.D. Pa. 1990). There, the court identified several problems with the intermediate scrutiny standard. First, the court suggested that a lesser standard of review gives undue deference to legislative bodies to fashion remedies for past wrongs, a task better suited for the judiciary. *Id.* at 1302. Second, this lesser standard makes it easier for a

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[18] At least one other court has seemingly applied strict scrutiny to a gender-conscious program. *See American Subcontractors Ass'n v. City of Atlanta*, 259 Ga. 14, 376 S.E.2d 662, 664 (1989).

legislature to enact gender-based relief over race-based relief, even though blacks have suffered more egregious discrimination over time. *Id.* Finally, the court noted that application of intermediate scrutiny "provides 'relatively little guidance in individual cases.'" *Id.* (quoting *Associated General Contractors*, 813 F.2d at 939).

We are cognizant of the problems with intermediate scrutiny. *See Associated General Contractors*, 813 F.2d at 939-42. Nonetheless, such standard of review remains the law of this circuit, if not of the land; certainly *Associated General Contractors* cannot be said to be "clearly inconsistent" with *Croson* on this matter. *Contractors Association* is telling in one other aspect. Despite the litany of problems it found with intermediate scrutiny, the court applied intermediate scrutiny nonetheless. *See id.* at 1304.[19] Accordingly, we find ourselves powerless to overrule *Associated General Contractors* on this point, even if we were so inclined. Thus, we shall employ intermediate scrutiny to review King County's WBE program.

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[19] In addition, intermediate scrutiny may not be as irrational as the *Contractors Association* Court suggested. The Seventh Circuit recently noted that "it can be argued that if sex discrimination is not so serious a wrong as racial discrimination we need not worry about confining its use to the remedial setting." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert denied*, 111 S. Ct. 2261 (1991).

C

Under intermediate scrutiny, a gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). In the context of WBE preferences, the two prongs of this intermediate scrutiny test tend to converge into one.

A governmental entity "may invoke a compensatory purpose to justify a discriminatory classification 'only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.'" *Associated General Contractors*, 813 F.2d at 940 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)). "[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725.

However, the mere recitation of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny. *See Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)). "The notion that women need help in every business and profession is as pernicious and offensive as its converse, that women ought to be excluded from all enterprises because their place is in the

home." *Associated General Contractors*, 813 F.2d at 941. Some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field. *See Hogan*, 458 U.S. at 729 (striking down a woman-only state-sponsored nursing school, where state "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field").

Unlike the strict standard of review applied to race-conscious programs, intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy. In *Associated General Contractors*, we observed that the "[g]overnment has the broad power to assure that physical differences between men and women are not translated into permanent handicaps, and that they do not serve as a subterfuge for those who would exclude women from participating fully in our economic system." 813 F.2d at 940. Similarly, in *Webster* the Supreme Court observed that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." 430 U.S. at 317. *But see Michigan Road Builders*, 834 F.2d at 595 ("WBE preferences . . . cannot withstand constitutional attack since evidence of record that the state discriminated against women is nonexistent.").

In *Associated General Contractors*, we applied these principles to San Francisco's WBE preference program. Remedying disadvantages women faced in the marketplace, we concluded, was an important and legitimate concern. 813 F.2d at 941. We were, however, troubled by the preference's sweeping scope. "The ordinance," we observed, "is unusual in the breadth of the subsidy it gives to women"; indeed, the program subsidized WBEs in virtually every industry in which San Francisco contracted, including industries for which there was no reason to believe that women were disadvantaged. *See id.*

Nonetheless, we concluded that the program survived a facial challenge. "Although the city's program may extend preferences to some fields where women are not disadvantaged, experience suggests that these are still the exceptions." *Id.* at 942. In accordance with Hogan, however, we left the door open to industry-specific challenges: "We may reach a different conclusion if and when the WBE preferences are challenged as applied to an industry where women are not disadvantaged." *Id.*

In the present case, we conclude, as we did in *Associated General Contractors*, that King County's WBE preference survives a facial challenge. Like San Francisco, King County has a legitimate and important interest in remedying the many disadvantages that confront women business owners. Moreover, the means chosen are substantially related to the objective. The utilization goals under both the set-

aside and preference methods are legitimate means of furthering the objective, and are not unduly onerous. Similarly, while King County's program, like that in San Francisco, gives preference to women in all industries contracting with the County, this alone is insufficient to warrant invalidating the entire program. *See id.* at 941-42.

On the record presently before us, an industry-specific challenge must also fail. The record adequately indicates discrimination against women in the King County construction industry. Particularly telling is the twenty-two-page affidavit of Anne C. Symonds, president of the consulting engineering firm of Anne Symonds & Associates, Inc. For the years 1985-87, Symonds noted that less than seven percent of the firm's business came from private contracts; most of the firm's work resulted from gender-based set-asides. Additionally, Symonds observed that, to the best of her knowledge, her firm, established in 1980, was the first woman-owned engineering firm in the state of Washington. Symonds averred that she has attempted to obtain more private contract work, but has been unsuccessful. She attributed her lack of success to the "discriminatory attitude toward me and towards women and minority businesses generally."

The district court properly granted summary judgment to King County as to the WBE portion of its set-aside program.

V

Coral Construction seeks an award of attorney's fees under 42 USC § 1988, which permits the award of attorney's fees to a prevailing party under several specified civil rights statutes, including sections 1981 and 1983. By its own terms, that section provides that a party must "prevail" to be eligible for recovery of attorney's fees. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980). As a general rule, a party who obtains the reversal of judgment on appeal is not a "prevailing party" unless such reversal also resulted in entry of judgment for that party. *See id.* at 757-59. No such judgment has yet been entered here. Accordingly, an award of attorney's fees at this time would be premature.

VI

For the foregoing reasons, the district court's grant of summary judgment for King County is reversed as to the MBE portion of the set-aside program. On remand, the district court should determine whether the MBE program, as it existed in September 1989, meets the "compelling governmental interest" requirement in light of the additional factual support offered by the County. The district court shall also consider whether there is a causal link between the program's geographic overbreadth and Coral Construction's injury. If either of these questions is answered in the affirmative, Coral

Construction would be entitled to judgment and an award of damages.

We leave the issue of the continued jurisdiction over Coral Construction's requests for injunctive and declaratory relief to the sound discretion of the district court.

As to the WBE portion of the set-aside program, the district court's grant of summary judgment for King County is affirmed.

Parties will bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

CORAL CONSTRUCTION COMPANY, an Oregon corporation; and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., an Oregon non-profit corporation,	)	No. C89-1488WD
Plaintiffs-Appellants,	)	
v.	)	
KING COUNTY, a legal subdivision of the State of Washington,	)	
Defendant-Appellee.	)	

OPINION: ORDER ON MOTIONS FOR SUMMARY JUDGMENT WILLIAM L. DWYER, UNITED STATES DISTRICT JUDGE

Plaintiffs and defendant have filed cross-motions for summary judgment. The parties agree that no disputes of fact exist and that this case will be fully decided on the present record. The court has considered all materials filed by the parties and has heard oral argument of counsel. A number of letters from non-parties have been received; these cannot be considered and have been placed in the chambers file. Being fully advised, the court now finds and rules as follows:

I. BACKGROUND

On May 1, 1989, the King County Council passed an ordinance amending the county's set-aside program for minority- and women-owned business enterprises ("MWBE's"). Proceedings of the King County Council Regular Meeting, Record at 1, 2 (May 1, 1989); King County, Wash., Code ch. 4.18. The program provides two methods by which MWBE's may receive preferences in bidding on county contracts. Under one method, contractors whose bids are within five percent of the lowest responsive bid are given preference in the award of the contract if their bids show that they are MWBE's or will use MWBE's on the project. King County, Wash., Code § 4.18.060(A)(1) ("percentage preference method"). Thus, an MWBE whose bid was five percent higher than the lowest responsive bid could nevertheless be awarded the contract over a low bidder who was not a MWBE.

Under the other set-aside method, contractors for county contracts of more than $10,000 must, with certain exceptions and limitations, use MWBE's for particular percentages of work on hose contracts. King County, Wash., Code § 4.18.060(A)(2).

Plaintiff Coral Construction Company was the low bidder on a King County guardrail construction contract. Applying the percentage preference method,[1] the county awarded the contract to a minority business enterprise ("MBE"), whose bid was higher than that of Coral Construction.

Coral Construction and an Oregon chapter of the Associated General Contractors of America, Inc., brought this suit claiming that King County's set-aside program, on its face and as applied to Coral Construction, violates plaintiffs' equal protection rights. Plaintiffs rely on a recent case, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in which the Supreme Court ruled that a municipal set-aside program violated the equal protection clause.[2]

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[1] The percentage preference method was used notwithstanding the contract's value of more than $10,000. *See* King County, Wash., Code § 4.18.060(C) (county department may use alternate set-aside method if alternate is "more feasible method of achieving" MWBE utilization goal).

[2] The equal protection clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

In *Croson* the Court examined a set-aside program adopted by the city of Richmond, Virginia. The Richmond program required prime contractors to award at least 30 percent of the dollar amount of each city construction contract to MBE's. 109 S. Ct. at 707.

Government classifications based on race may be employed only if justified by compelling government interests, and if their use is necessary to accomplishing their legitimate purpose. *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984). Remedying the effects of past discrimination can represent such a compelling interest. *See Croson*, 109 S. Ct. at 720 (plurality opinion). A majority[3] of the Court in *Croson* agreed that strict scrutiny is required in judicial review of race-based affirmative action programs, in order to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 721 (plurality opinion); *id.* at 735 (Scalia, J., concurring in the judgment). In other words, courts must strictly scrutinize the use of racial classifications to determine

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[3] A majority of the court adopted parts I, III-B, and IV of Justice O'Connor's opinion, which addressed the background of the case, the evidence supporting Richmond's program, and the "narrow tailoring" requirement, respectively. *Croson*, 109 S. Ct. at 712-17, 723-29. Two Justices joined in part II of Justice O'Connor's opinion, while three joined in parts III-A and V of that opinion. Two Justices filed opinions concurring in parts of the opinion and concurring in the judgment. Justice Scalia concurred in the judgment. Three Justices dissented.

whether the compelling interest relied upon by the government actually exists and suffices.

Applying this standard, the Court found that Richmond's set-aside program (1) was not supported by adequate evidence of past discrimination to establish Richmond's compelling interest; and (2) was not tailored narrowly enough to its goal of remedying the effects of past discrimination. *Id.* at 723-29.

The *Croson* Court did not, however, conclude that race-based set-aside programs violate the equal protection clause per se. Justice O'Connor stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction . . .. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.* at 729 (plurality opinion). A majority of the court agreed with this statement. *See id.* at 734 (Kennedy, J., concurring); *id.* at 739 (Marshall, dissenting); *see also Joint Statement, Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 Yale L.J. 1711, 1712 (1989) [hereinafter *Constitutional Scholars' Statement*] ("On at least four noteworthy occasions . . . the Supreme Court has made clear that affirmative action remedies, if carefully devised, can be entirely constitutional.").

The Richmond program did not include preferences for women-owned business enterprises

("WBE's"), so the Croson Court did not address such programs. The Ninth Circuit has held that WBE set-aside programs are subject to "mid-level review" -- a standard less searching than "strict scrutiny." WBE programs must demonstrate "exceedingly persuasive justification" to survive mid-level review. *Associated Gen. Contractors v. City & County of San Francisco*, 813 F.2d 922, 939-40 (9th Cir. 1987) ("*AGC*") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)), *petition for mandamus dismissed*, 110 S. Ct. 296 (1989). Also, the means used to further the goal of remedying he effects of past discrimination against women must be "substantially related" to the achievement of that goal. *Id.* at 941.

II. DISCUSSION

Plaintiffs contend that King County's MBE set-aside program suffers from the same two defects found fatal to Richmond's program. They also argue that the WBE aspects of the program do not satisfy the standards set forth in *AGC*

In *Croson*, virtually no evidence of past discrimination had been presented to support the rigid quota imposed by the Richmond set-aside program. The disparity in that case between the evidence of the harm and the breadth of the remedy has no parallel in the King County set-aside program. King County has evidence of greater weight, detail, and specificity to support the adoption of its more flexible MWBE set-aside program. Applying strict scrutiny to the

MBE aspect of the program, the evidence supporting King County's program is sufficient under the *Croson* requirements, and the program is narrowly tailored. The WBE set-aside program survives the less intense scrutiny applied to gender-based programs.

A. Basis in Evidence for King County's Program

The *Croson* Court found that the Richmond City Council lacked the required "'strong basis in evidence for [the council's] conclusion that remedial action was necessary.'" *Croson*, 109 S. Ct. at 724 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). Although the Court did not specify the quantity of evidence that would be sufficient, it rejected Richmond's evidence as not "approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." *Id.* (emphasis in original).

The set-aside program at issue here is supported by a strong basis in evidence of past discrimination in the King County construction industry. Several dozen people gave written or oral descriptions of such discrimination. *See, e.g.*, Letter of Reginald S. Frye, Record at 230, 232-33; Affidavit of Dianne M. Strobel, Record at 430; Affidavit of Rigo Vela, Record at 468. Many of the sources relied upon by the County Council provided specific examples of past discrimination in the construction industry in King County.

The contrast between the evidence in *Croson* and that before the King County Council is striking. The *Croson* Court found: "There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's crime contractors had discriminated against minority-owned subcontractors." *Id.* at 714. The district court that approved the Richmond plan based its findings of past discrimination on several factors, including statements by a few proponents of the set-aside program that there had been discrimination in the construction industry, and reports of a significant disparity between the percentage of minorities receiving contracts from the city and the percentage of minorities in the city population. *See id.* at 724. The detailed and specific descriptions of discrimination found in the King County record, on the other hand, are not the type of "generalized assertion[s]" of past discrimination criticized by the *Croson* Court. *See id.* at 723.[4]

Moreover, in *Croson* much of the evidence was found to be of "little probative value" because it did not apply specifically to discrimination in the *local* construction industry. *Id.* at 714, 723-24. The Court

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[4] After this action was commenced, King County received a draft of a detailed report on past discrimination in the local construction industry. A copy of that report has been filed with the court. Plaintiffs contend that it should not be considered. The record contains sufficient evidence to support the county's program in the absence of the disputed report. The court has not considered the report in reaching its decision.

thus found Richmond's evidence inadequate to identify past discrimination sufficiently to support the "rigid quota" prescribed by the set-aside program. *Id.* at 727. In contrast, nearly all of King County's evidence applies specifically to the construction industry within the county's jurisdiction.[5]

Plaintiffs argue that the county inappropriately relied on evidence of discrimination in other jurisdictions, such as Pierce County, Seattle, and the Municipality of Metropolitan Seattle ("Metro"). The *Croson* Court did not bar the "sharing" of evidence among local jurisdictions with inclusive or common geographic borders. The Court merely held that evidence of discrimination in the *national* construction industry was not enough to support imposition of a *local* race-based remedy. *Id.* 109 S. Ct. at 726-27. King County could properly consider evidence from Seattle, which is located within the county, and from Metro, whose borders are identical to those of the county.[6]

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[5] Plaintiffs argue that *Croson*, in citing *AGC* with approval, implicitly adopted a minimum standard for evidence of discrimination, *i.e.*, evidence superior to that rejected by teh *AGC* court. *See Croson*, 109 S. Ct. at 719, 725. They assert that King County's evidence is not as detailed or specific as that rejected as inadequate in *AGC*. *See* 813 F.2d at 931-34. However, the citations to *AGC* in *Croson* were used to support other conclusions. Those citations do not adopt any evidentiary standards that might be inferred from *AGC*.

[6] Plaintiffs argue that the county inappropriately relied on evidence of discrimination in other jurisdictions, such

(continued...)

Plaintiffs also argue that the county may rely only on evidence of discrimination by the county, and not on evidence that merely shows past discrimination in the local private construction industry. *See AGC*, 813 F.2d at 931-32 (lack of evidence of past discrimination by city officials was the disputed ordinance's "most significant shortcoming"). This holding in *AGC* has been effectively overruled by *Croson*. The plurality found:

> [If] the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry,

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[6](...continued)
as Pierce County, Seattle, and the Municipality of Metropolitan Seattle ("Metro"). The *Croson* Court did not bar the "sharing" of evidence among local jurisdictions with inclusive or common geographic borders. The Court merely held that evidence of discrimination in the national construction industry was not enough to support imposition of a local race-based remedy. *Id.* 109 S. Ct. at 726-27. King County could properly consider evidence from Seattle, which is located within the county, and from Metro, whose borders are identical to those of the county.

Some of the present record refers to evidence of discrimination outside King County and/or the construction industry. *E.g.*, Transcript, Pierce County Council Fiscal Management Comm., Record at 119. Even when all such evidence is disregarded, however, the remaining evidence is fully sufficient to support the county's finding of past discrimination in the King County construction industry.

> we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Croson, 109 S. Ct. at 720. King County's construction project dollars flowed through the local construction industry, making the county a "passive participant" in the discrimination described on the record.

A Supreme Court plurality opinion alone could not overturn the Ninth Circuit's holding in *AGC*. *See, e.g., Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1292 n.11 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989). However, six Justices support the plurality's opinion that a state government entity seeking to impose a race-based remedy need not obtain evidence of its own direct discrimination to justify that remedy. *Id.* 109 S. Ct. at 717-20 (plurality opinion) (Justice O'Connor joined by two other Justices); *id.* 109 S. Ct. at 745-49 (Marshall, J., dissenting) (joined by two other Justices).[7] Where multiple opinions leave the

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[7] Justice Kennedy also seems to have agreed with this opinion. *See Croson*, 109 S. Ct. at 735 (Kennedy, J., (continued...)

Court's ultimate holding in some doubt, "a lower federal-court must do its level best to extract the holding that commanded a majority . . . to arrive at the governing principles and limitations." *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989) (separate opinion of Silberman, J.). The opinions of these six Justices constitute the majority holding on this issue. *See Constitutional Scholars' Statement, supra,* at 1713; *cf. Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 354 (D.C. Cir. 1989) (relying on opinions in *Croson* of three Justices in plurality and three in dissent for continued vitality of *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

The Supreme Court's post-*Croson* summary affirmance of a Sixth Circuit decision similar to *AGC* does not alter this holding in *Croson*. *See Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987) (requiring showing of past government discrimination), *aff'd without opinion,* 109 S. Ct. 1333 (1989). A summary affirmance by the Supreme Court affirms only the judgment of the lower court, not necessarily that court's reasoning. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Summary actions by the Supreme Court are not to be read as "a renunciation by [the] Court of doctrines previously announced in

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[7](...continued)
concurring) (among matters left unexamined by Richmond City Council was "extent to which the City contributed to [past discrimination], either by intentional acts or by passive complicity in acts of discrimination by the private sector") (emphasis added).

[its] opinions after full argument," nor should they be understood "as breaking new ground." *Id.* at 176. Ct. at 2240-41. The Court's holding in *Croson* remains undisturbed by its later affirmance of *Michigan Road Builders.*

The record contains ample evidence of past discrimination against women in the local construction industry. *See, e.g.*, Affidavit of Cindy M. Strouss, Record at 605, 605-07; Affidavit of Anne C. Symonds, Record at 673-694. This evidence provides the "exceedingly persuasive justification" required to support the gender-based remedy imposed by the county's WBE set-aside program, *see AGC*, 813 F.2d at 939-40, and identifies the past discrimination clearly enough to assure that the remedy will be normal.

B. Narrow Tailoring of the Remedy

The strict scrutiny standard requires that race-based measures "fit" the compelling goal which justifies their use. 109 S. Ct. at 721 (plurality opinion). Under the less stringent mid-level scrutiny, gender based remedies must be "substantially related" to the goal of eliminating the effects of gender discrimination. *AGC*, 813 F.2d at 941.

The *Croson* Court found that the Richmond MBE program suffered two defects that made it unconstitutionally broad. First, the city did not appear to have considered the use of race-neutral means to increase

minority business participation in city contracting. *Croson*, 109 S. Ct. at 728. The Court noted:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutrai program of city financing for small firms would, a fortiori, lead to a greater minority participation. The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside. There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.

Id.

King County's MWBE program does not suffer from this defect. The county considered the race-neutral alternatives suggested in *Croson*. King County, Wash., Code § 4.18.005(E) (finding that "no effective [race-neutral] alternatives appear to be presently available"). Those alternatives were rejected

because state law bars the county from implementing them. *See In re Marriage of Johnson*, 96 Wash. 2d 255, 261-68, 634 P2d 877 (1981) (state constitution prohibits gifts or loans of public funds to private entities) (citing Wash. Const. Art. VIII, § 5); RCW ch. 39.08 (state statute restricting county bonding procedures).

Plaintiffs argue that several race-neutral alternatives could have been but were not considered by the county. However, the deposition of Terry Koyano, cited by plaintiffs in support of this argument, shows that the county did consider many of the alternatives plaintiffs suggest. Koyano Deposition at 27-36. *Croson* does not compel the county to consider every imaginable race-neutral alternative, nor to try alternatives that would be plainly ineffective. The record establishes that King County carefully considered race-neutral alternatives before implementing its race-based remedy.

The second defect cited in *Croson* was the Richmond program's "rigid numerical quota." *See infra*. The Court held:

> [The] 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their

> representation in the local population.

Croson, 109 S. Ct. at 728. The Court was concerned that the Richmond program was not tied to the local availability of MBE's, but instead to the number of minorities in the local population. *Id.*

The King County program is not a rigid quota system. Two methods may be used to provide benefits to MWBE's. The percentage preference method used to award the contract at issue in this case is far less burdensome to non-MWBE's than the quota imposed by Richmond. The King County program includes several measures to conform the remedy provided to the identified discrimination. For example, MWBE utilization requirements are tied to the availability of qualified MWBE contractors, not to the percentage of minorities or women in the population in general. King County, Wash., Code § 4.18.060(B). The county may waive or reduce the MWBE preferences if qualified MWBE's are not available, or if a bidding MWBE's higher price is not attributable to the effect of past discrimination. *Id.* § 4.18.070(A)(5). These provisions prevent the county's MWBE program from extending benefits not related to past discrimination. *See Croson*, 109 S. Ct. at 728-29 (noting similar waiver provisions in federal set-aside program approved in *Fullilove*).

The Richmond MBE program potentially provided benefits to groups not subjected to past dis-

crimination. *Id.* at 728. The Court criticized this overinclusion that resulted from the program's rigidity: "Under Richmond's scheme, a successful [minority] entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race." *Id.* at 729. King County avoids this pitfall by allowing denial of MWBE program benefits in particular contracts or categories of contracts if the group in question has not been discriminated against. King County, Wash., Code § 4.18.010(S), -(HH).

The MWBE program at issue here is narrowly tailored to remedy the effects of the past discrimination identified in the local construction industry. The county considered race-neutral alternatives, and adopted some of them, but still found evidence of ongoing effects of past discrimination. The remedy adopted is different in kind from the racial quota employed by Richmond, and avoids the overinclusiveness which led the Supreme Court to find that city's remedy unconstitutional.

III. CONCLUSION

The Supreme Court has held that race-based government programs must remain a last resort in attempts to remedy the effects of past discrimination. The *Croson* holding requires that such programs be based on sufficient evidence of past discrimination, and that they be limited to redressing actual discrimination. Local governments are also strictly limited in

their use of gender-based programs. King County had enough evidence before it to prove the discrimination it sought to redress, and the remedy it has adopted is narrowly tailored to the need. The County's program is constitutional under both the *Croson* and the *AGC* standards.

Accordingly, plaintiffs' motion for summary judgment is denied, and defendant's motion for summary judgment is granted. The clerk is directed to enter judgment accordingly, and to send copies of this order to all counsel of record.

Dated: December 4, 1989.

Chapter 4.18
MINORITY AND WOMEN'S BUSINESS ENTERPRISES

Sections:

4.18.005 Findings.
4.18.010 Definitions.
4.18.020 Powers and duties.
4.18.030 Utilization goals.
4.18.040 Accomplishment of utilization goals.
4.18.050 Utilization requirements, general.
4.18.060 Utilization requirements, specific.
4.18.070 Waivers.
4.18.080 Monitoring, reporting and enforcement.
4.18.090 Special report required.
4.18.100 Authorization to implement procedures.
4.18.110 Effect of ordinance, status of solicitations.
4.18.120 Severability.
4.18.130 Study and report.

4.18.005 Findings.

The county council hereby finds the following facts:

A. In hiring and dealing with contractors and subcontractors of all types, public and private owners, developers, contractors, financial institutions and sureties have discriminated and do discriminate against minority and women's businesses doing

business with King County based on the race and sex of the owners of these businesses.

B. But for the provisions of its past and present minority and women's business enterprise ordinances, King County would have been, and would continue to be, a passive participant in the discrimination against these businesses.

C. The provisions of this chapter are necessary to remedy the discrimination against minority and women's businesses and to prevent King County from financing and participating in this discrimination with its contracting dollars.

D. The market from which King County draws contractors extends throughout the State of Washington.

E. King County is prohibited by state law from helping minority and women's businesses overcome the effects of discrimination through financial assistance or reduction of bonding requirements. While the existence of such alternative remedies must continue to be explored, no effective alternatives appear to be presently available.

F. Further study of the nature and extent of the discrimination against minority and women's businesses must be conducted to determine whether additional amendments to the program are necessary. The continuation of the program during the period of

this study is necessary to prevent irreparable injury to such businesses. (Ord. 8937 § 1, 1989.)

4.18.010 Definitions.

All words shall have their ordinary and usual meanings except those defined in this section which shall have in addition, the meaning set forth below. In the event of conflict, the specific definition spelled out below shall presumptively, but not conclusively prevail.

A. "Affirmative Action Plan," shall mean the written, formal King County policy adopted annually, stating the goals and programs of county government to be preformed in the areas of contract compliance, equal employment opportunity and minority/women's business contracting.

B. "Affirmative Efforts," shall mean making vigorous attempts in good faith to contact and contract with minority/women's businesses. Where affirmative efforts are required by, or are grounds for, waiving provisions of this chapter, the director of the department of executive administration's determination shall be based on procedures to be outlined in accordance with the dictates of this chapter.

C. "Architectural and Engineering Contracts" shall mean contracts for the performance of architectural and engineering services by licensed and

registered firms and persons acting as consultants to King County.

D. "Broker" shall mean a business which purchases goods or services from another business or businesses for the sole purpose of resale to the county or a contractor doing business with the county.

E. "Certification" shall mean the process by which the Office of Minorities and Women's Businesses of the State of Washington determines a business meeting the criteria for a minority-owned business enterprise, a women-owned business enterprise, a women-owned business enterprise, and/or a combination minority and women's business enterprise set forth in WAC chap. 326-02 and WAC chap. 326-20.

F. "Combination Minority and Women Business" means a business certified as a combination minority and women's business enterprise by the Office of Minority and Women's Businesses of the State of Washington which is legitimately owned and controlled by minority males or minority businesses defined in this chapter.

G. "Commercially Useful Function," shall mean the performance of real and actual services in the discharge of any contractual endeavor. The contractor must perform a distinct element of work which the business has the skill and expertise as well as the responsibility of actually performing, managing and

supervising. In determining whether a business is performing a commercially useful function, factors, including but not limited to the following, will be considered:

1. Whether the business has the skill and expertise to perform work for which it is being/has been certified;

2. Whether the business actually performs, manages and supervises the work for which it is being/has been certified; and

3. Whether the business purchases goods and/or services from non-minority/women's business enterprise and simply resells goods to the county, county contractor, or other person doing business with the county for the purpose of allowing those goods to be counted towards fulfillment of minority/women's business enterprise utilization goals.

H. "Concession Contracts," shall mean those contractual arrangements for the sale of food, beverages and/or items of personal property at any facility owned and/or managed by King County.

I. "Conduit," shall mean a minority/women's business with which a contractor has agreed to subcontract, when the minority/women's business does not perform the subcontract, and instead the subcontract is performed by a non-minority/women's business.

J. "Construction Contracts," shall mean, those contractual arrangements made by King County for the construction, repair, rehabilitation, alteration, conversion or extension of buildings, parks, streets or other improvements to real property.

K. "Consultant Contracts," shall mean those contractual arrangements made for the procurement of expert personal, professional and/or technical services. Consultant contracts shall not include architectural and engineering contracts as defined by this chapter.

L. "Contract Awarding Authority," shall mean any person with the power to enter into a contractual arrangement binding King County and shall also mean the particular office, agency or division on whose behalf the contract is entered. In addition, this term shall include, but shall not be limited to heads of county departments, divisions or offices.

M. "Contractor" shall mean any person, partnership, corporation, or other type of business entity which has a contract with King County or serves in a subcontracting capacity with an entity having a contract with King County for the provision of goods and/or services.

N. "Corporate Sponsored Dealership," shall mean a bona fide minority/women's business which meets the following standards in lieu of the fifty-one

percent ownership criterion of subsection R.1., and the contract criteria of subsection R.2. The minority/women owners have entered into an agreement, contract, or arrangement with a national or regional corporation and have been granted a license to offer, sell or distribute goods or services at wholesale or retail, leasing or otherwise using the name, service mark, trademark or related characteristic of the sponsoring corporation. Capital investment for the dealership is jointly contributed by the minority/women owners and the sponsoring corporation, with the sponsoring corporation initially contributing the largest percentage. The original investment contributed by the minority/women owners may be less than fifty-one percent with a specified time limit established with the sponsoring corporation for the minority/women owners to become the sole owner of the dealership. The standards for qualifying a corporate sponsored dealership as a bona fide minority/women's business enterprise shall include, but are not limited to:

1. The minority/women owners must have contributed a minimum of 25% of the capitalization investment (total required equity capital) in the dealership corporation.

2. The dealership contract must include a binding agreement stating that the buy-out of the corporate sponsor's interest by the minority/women owners will occur within 10 years.

3. If the sponsoring corporation retains majority voting rights and control of the board of directors, then the minority/women owners must annually apply at least fifty percent of the net profit and bonuses toward the buy-out of the corporate sponsors' interest within the buy-out time limit established with the corporation.

4. The minority/women owners must show active participation in the decision-making process on the board of directors of the dealership.

5. The minority/women owners must have operational control, and as such have day-to-day management control of the dealership, with responsibility for sales, service volume and profits.

6. The sponsoring corporation must have specifically developed a national or regional corporate sponsored dealership program to address the present-day issue of lack of opportunities for minorities or women in the dealership industry, which includes such features as: capitalization assistance from the sponsoring corporation, ongoing business operations training, technical assistance to the dealership owner, and a corporate sponsored minority and women's business program.

7. The minority/women owners must demonstrate that the relationship between the corporate sponsor and the minority/women's business was not formed for the primary purpose of achieving

certification under this subsection N, or any other similar provision of any other ordinance, regulation, rule or law.

8. The minority/women owners having prior business or management experience relating to the business being entered into as an owner.

O. "Department," shall refer to any department as defined by King County ordinance or other applicable law and shall include all county agencies not associated with a department. These agencies shall similarly discharge those duties this chapter requires of departments and shall include the King County prosecuting attorney, the King County assessor, and the King County council.

P. "Front" shall mean a business which purports to be a minority/women's business but which is actually owned and/or controlled in a manner which is inconsistent with the requirements of certification.

Q. "Joint Venture," shall mean an association of two or more persons, partnerships, corporations or any combination of them, established to carry on a single business activity which is limited in scope or direction. The degree to which a joint venture may satisfy relevant utilization goals cannot exceed the proportionate interest of the minority/women's business held as a member of the joint venture in the work to be performed. The agreement establishing

the joint venture, partnership or other multi-entity relationship shall be in writing. Further, minority/ women's participation in a joint venture shall be based on the sharing of real economic interest in the venture and shall include proportionate control over management, interest in capital acquired by the joint venture, and interest in earnings.

R. "Legitimately Owned and Controlled," shall mean for the purpose of determining whether a business is a "minority business" that minorities shall possess:

1. Ownership of at least fifty-one percent interest in the business, unless the minority business qualifies as a corporate sponsored dealership under the provisions of subsection N. The ownership shall be real and continuing, and shall go beyond the pro forma ownership of the business reflected in the ownership documents. The minority owner(s) shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance, rather than the form, of arrangements.

2. Control over management, interest in capital, interest in profit or loss and contributions to capital, equipment and expertise on which the claim of minority-owned status under this chapter is based. The minority owners must posses and exercise the legal power to direct the management and policies of

the business and to make the day-to-day as well as major decisions on matters of management, policy, and operations. If the owners of the business who are not minorities are disproportionately responsible for the operation of the business, then the business is not controlled by minorities. The business must be owned, controlled, and managed on a day-to-day, full-time basis by the minority owner(s). The requirements of this subsection R.2. shall not apply, if the minority business qualifies as a corporate sponsored dealership under the provisions of subsection N.

3. Ownership and control shall be measured as though not subject to the community property interest of a spouse if both spouses certify that:

a. Only one spouse participates in the management of the business;

b. The nonparticipating spouse relinquishes control over his/her community property interest in the subject business.

S. "Minority Business," means a business certified by the Office of Minority and Women's Businesses of the State of Washington as a minority business enterprise which is legitimately owned and controlled by a minority person or persons as defined in this section. The director of the department of executive administration is authorized to determine that specific racial groups have not been discriminated

against in their ownership and operation of particular trades or areas of business or in the particular geographical areas in which they operate. The director may exclude such businesses from consideration as "minority businesses" under this chapter, in connection with contracts involving such trades or areas of business, as provided in Section 4.18.080 of this chapter.

T. "Minority or Minorities" means a person who is a citizen of the United States and who is a member of one or more of the following historically disadvantaged racial groups:

1. Black: Having origins in any of the Black racial groups of Africa;

2. Hispanics: Of Mexican, Puerto Rican, Cuban, or Central or South American culture or origin;

3. Asian American: Having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands; or

4. American Indian or Alaskan Native: Having origins in any of the original peoples of North America.

The director of the department of executive administration shall have discretion to make a final decision as to whether an individual is a minority.

U. "Nonprofit Corporation" shall mean a corporation organized pursuant to R.C.W. Ch. 24.03. In the case of nonprofit corporations organized under the laws of a state other than Washington, a nonprofit corporation shall mean one organized for one or more of the purposes set forth in R.C.W. 24.03.015 and meeting the definitions in R.C.W. 24.03.005.

V. "Pass-Through" means buying or obtaining goods from a non-women's business, non-minority business or non-combination women/minority business, and reselling or transferring those goods to the county, county contractors or other persons doing business with the county for the purpose of obtaining any advantage or benefit conferred under this chapter, without performing a commercially useful function.

W. "Percentage Factor" shall mean the special ranking factors established by this chapter to be applied in certain competitive bid situations where minority/women's businesses respond to solicitation or are included as subcontracts in responding parties' responses to solicitation.

X. "Purchasing Contracts," shall mean; but not be limited to, those contracts which are awarded by the department of executive administration as the

representative of King County, or any contract awarded by King County for the purchase of tangible goods.

Y. "Responding Party," shall mean any person, partnership, corporation or business entity which makes a proposal as defined in this chapter in response to a solicitation as defined in this chapter.

Z. "Service Contracts," shall mean those contracts for technical, professional or other work performed by a vendor, such as the making of repairs, servicing, maintenance and/or cleaning, and which does not involve the provision of substantial tangible items such as materials, supplies or equipment. For the purposes of this chapter, the term "service contracts" shall not include construction, rental or leasing of equipment or the traditional professional services such as consulting, legal services, feasibility studies and design studies.

AA. "Set Aside," shall mean that proportion of each contract awarding authority's annual expenditure for contract goods and services which equals the contract awarding authority's annual goals for participation of minority/women's businesses as established by this chapter.

BB. "Small Business Concern" means a small business as defined pursuant to Section 3 of the federal Small Business Act and relevant regulations promulgated thereto.

CC. "Solicitation," shall mean a contract awarding authority's request for the provision of any one or more of the following: goods and services of any kind, equipment leases, and rentals/purchase of space. Solicitation shall include requests for proposals, invitations to bid and similar items. "Solicitation specifications," shall mean any documents, literature or other information accompanying a solicitation which provides additional data regarding the contract awarding authority's request.

DD. "Utilization Goals," shall mean those separately designated annual goals for the use by King County of minority/women's businesses. The goals shall be expressed as a numerical percentage of the total dollar value of all contracts to be awarded by the county. These goals shall be applicable to businesses organized for profit, along with governmental agencies and quasi-governmental agencies, unless the agencies are specifically excepted by or in accordance with the provisions of this chapter.

EE. "Utilization Requirements," shall mean those efforts which responding parties, King County and the particular department shall make to meet the county's utilization goals, including but not limited to the percentage factors and set aside requirements established by this chapter.

FF. "Violating Party," shall mean a person or entity which has violated a provision or provisions of this chapter.

GG. "Waiver Statement," shall mean a written statement directed to the director, department of executive administration, containing reasons why any provision or provisions of this chapter shall not apply to a particular person, partnership, corporation, business entity, contract awarding authority, department, or other entity. Where a waiver or waivers are granted, the utilization goals shall be applied in a manner so as to reflect the loss of the monetary value of those contracts exempted from the requisites of this chapter.

HH. "Women's Business," means a business certified by the Office of Minority and Women's Businesses of the State of Washington as a women's business enterprise. The director of the department of executive administration is authorized to determine that women as a class have not been discriminated against in their ownership and operation of particular trades or areas of business or in the particular geographical areas in which they operate. The director may exclude such businesses from consideration as "women's businesses" under this chapter, in connection with contracts involving such trades or areas of business, according to the procedure provided for in Section 4.18.080 of this chapter.

4.18.020 **Powers and duties.** In addition to the powers and duties given to the King County executive elsewhere in this chapter, the executive shall, through the director, department of executive administration have responsibility for administering, monitoring and enforcing the goals and requirements identified in this chapter:

B. In addition to the powers and duties given the director, department of executive administration elsewhere in this chapter, the director, department or executive administration shall:

1. Establish rules, regulations, and procedures for implementing and administering this chapter;

2. Recommend to the King County executive annual utilization goals for King County;

3. Have the authority to enter into cooperative agreements with other government agencies concerned with increasing the participation of minority/women's businesses in government contracting;

4. With the advice of contract awarding authorities, formulate and periodically update a plan to make minority/women's businesses aware of contracting opportunities with King County;

5. Review all King County solicitation lists and where possible, place minority/women's businesses on such lists. These lists shall be updated periodically.

4.18.030 **Utilization goals.** A. On or before the first day of March of each year, the director, department of executive administration shall submit to the King County executive for approval proposed utilization goals for King County for that calendar year. Separate utilization goals shall be established for the use of minority businesses and for the use of women's businesses. These utilization goals shall be established separately for each of the following types of contracts: architectural and engineering contracts, concession contracts, construction contracts, consultant contracts, and purchasing and service contracts. The utilization goals shall be made part of the King County Affirmative Action Plan and shall be transmitted with the plan to the King County council for its approval. Existing utilization goals shall remain in effect until newly submitted ones receive final King County council approval.

1. The utilization goals shall be reasonably achievable. To the extent that relevant information is available, the utilization goals shall be based on the numbers of qualified minority businesses and women's businesses operating in King County.

2. The purpose of this chapter is to remedy the past effects of discrimination by

increasing the opportunities for minority and women's businesses to provide goods and services to King County using reasonably achievable goals.

a. Each utilization goal shall represent a minimum percentage of the dollars paid annually by each contract awarding authority to minority/women's businesses.

b. The proposed utilization goals shall be accompanied by a statement which shall identify the factors in this subsection and any other factors used in formulating the proposed utilization goals.

c. Any proposed reduction in utilization goals shall be accompanied by a statement which documents that reducing utilization levels is consistent with this purpose.

B. Each department shall annually formulate a contract forecast estimating the number, probable monetary value, (if known), type of contracts and the estimated solicitation date for the contracts the department expects to award along with any waivers it expects to request in the upcoming year. In addition an implementation plan describing how the particular department will accomplish its utilization goals shall be formulated. On or before January 1st of each year, each department will submit these documents to the director, department of executive administration.

4.18.040 **Accomplishment of utilization goals.** A. For all contracts, accomplishment of utilization goals established by this chapter shall be based on the dollar amount of the contract in question. Accomplishment of the goals shall be calculated in the following manner:

1. *General* -- The dollar value of any and all contracts awarded by a contract awarding authority to a minority/women's business shall be counted towards accomplishment of the applicable utilization goals.

a. The total dollar value of each contract awarded to business owned and controlled by both minority males and non-minority females shall be apportioned on the basis of the percentage of ownership to the utilization goals for minorities and women respectively.

b. The total dollar value of a contract with a minority/women's business owned and controlled by minority women shall be either counted toward the minority utilization goal or the goal for women, or apportioned on the basis of ownership between minorities and women, not to both.

2. *Subcontracts* -- If a contractor uses subcontractors who are minority/women's businesses, the amount is given to the minority/women's business

for their work on the contract shall be credited towards meeting the applicable utilization goals.

3. *Joint Ventures* -- Where one or more minority/women's businesses are participants in a joint venture with one or more non-minority or non-women's businesses, the amount of money received by the minority/women's business enterprise shall be calculated in proportion to their participation in the joint venture in accomplishing the applicable utilization goals.

4. *Supplies/Materials* -- The contract awarding authority or a prime contractor may count toward its utilization goals:

a. expenditures for materials and supplies obtained from minority/women's business suppliers and manufacturers; provided that, the minority/women's business assume the actual and contractual responsibility for the provision of the materials and supplies;

b. its entire expenditure made to a minority/women's business manufacturer; that is, a supplier that produces goods from raw materials or substantially alters them from resale;

c. the amount of the commission paid to minority/women's businesses and resulting from a particular contract with the county; provided

that a minority/women's business supplier performs a commercially useful function in the process.

5. **Brokers - Fronts - or Similar Pass-Through Arrangements**. Businesses acting as brokers, fronts, conduits or similar pass-through arrangements shall not be certified as minority/women's business enterprises, unless the brokering service reflects normal industry practice and the broker performs a commercially useful function. Such businesses determined to be acting under these arrangements or persons who create such arrangements shall be subject to the penalties enumerated in this chapter.

B. The director, department of executive administration shall calculate the accomplishment of utilization goals for King County. In the event of disputes regarding these calculations, a department may request review of the director's decision by the King County executive.

C. After having met their annual utilization goals, departments shall continue to make affirmative efforts to do business with minority/women's businesses.

D. The failure of a department or King County to meet the annual dollar utilization goals established from time to time by this chapter shall not constitute grounds for a lawsuit against a department or the county, provided that the department or the county has made affirmative efforts to meet those goals. The

failure of a department to meet the requirements of this chapter shall be reviewed by the King County executive and corrective action taken where appropriate.

4.18.050 **Utilization requirements, general.** A. In order to meet the utilization goals established in accordance with this chapter, efforts including but not limited to the following shall be made:

1. Under the auspices of the director, department of executive administration, a technical assistance and outreach program shall be established.

2. Prior to entering into any contract, the contract awarding authority shall:

a. Make affirmative efforts to solicit proposals from minority/women's businesses;

b. Examine alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by minority/women's businesses.

3. Prior to submitting any bid, proposal, or other response to a solicitation for which subcontractors may be used, responding parties shall make good faith affirmative efforts to contact, solicit bids and proposals from, and use minority/women's businesses.

4. The following shall be included in the body of the contract document in any and all contracts signed between a contract awarding authority and a contractor:

a. A provision indicating that this chapter is incorporated by reference into any and all King County contracts and failure to comply with any of the requirements of the chapter by a contractor will be considered a breach of contract.

b. A requirement that during the term of the contract the contractor shall comply with, as to tasks and proportionate dollar amounts throughout the term of the contract, all plans made in their proposal for the use of minority/women's businesses. In the absence of a waiver, minority/women's businesses for which any reason no longer remain associated with the contract or the contractor shall be replaced with other certified minority/women's businesses.

c. A provision prohibiting any agreements between a responding party and a minority/women's business in which the minority/women's business promises not to provide subcontracting quotations to other responding or potential responding parties.

d. The requirement of maintenance of relevant records, and information necessary to document compliance with this chapter and shall

include the right of the county to inspect such records.

e. A provision requiring the payment of specific liquidated damages in the event a contractor fails to perform a commercially-useful function and/or operates as a broker, front, conduit or pass-through, with the amount of liquidated damages established in advance by the department of executive administration based on the type of contract involved. The provision should include the following language: The purpose of King County's minority/women's business ordinance is to provide a prompt remedy for the effects of past discrimination. The county in general, and this program in particular, are damaged when a contract, or portion of a contract, to be performed by a minority/women's business is not actually performed by a minority/women's business enterprise in compliance with this chapter. Because the actual amount of such damage is not reasonably calculable, the parties agree and stipulate that liquidated damages of $_____ fairly estimate the amount required to compensate the county for resulting delays in carrying out the purpose of the program, the costs of meeting utilization goals through additional contracts, the administrative costs of investigation and enforcement and other damages and costs caused by the violation.

4.18.060 **Utilization requirements, specific.** A. In order to expedite achieving of the utilization goals established in accordance with this chapter, the

following utilization requirements shall apply to all competitive bids and other responses to solicitation:

1. For all purchasing, service, and concession contracts and construction contracts under ten thousand dollars, the following percentage factor shall be used in determining which responding party is the lowest responsible bidder:

a. Where a contract does not require and/or responding parties do not plan to use subcontractors, suppliers or other business in similar assisting roles, responding parties whose bids are within five percent of the bid made by the lowest responsive bidder shall be ranked as follows:

First, Minority/women's businesses.

Second, Non-minority/non-women's businesses.

b. Where a contract requires the use of subcontractors, suppliers or other businesses in similar assisting roles, responding parties whose bids are within five percent of the bid made by the lowest bidder shall be ranked in the following order:

First, minority/women's businesses which use minority/women's businesses as subcontractors, suppliers or in similar assisting roles.

Second, minority/women's businesses or joint ventures where minority/women's business participation is at least twenty-five percent of the dollar value of a contract and do not use minority/women's businesses as subcontractors, suppliers, or in similar assisting roles;

Third, non-minority/non-women's businesses which use minority/women's businesses as subcontractors, suppliers, or in similar assisting roles.

Fourth, non-minority/non-women's businesses which do not use minority/women's businesses as contractors, suppliers, or in similar assisting roles.

c. Where a contract could require the use of subcontractors, suppliers or other businesses in similar assisting roles and some responding parties make use of such and others do not, responding parties whose bids are within five percent of that made by the lowest bidder shall be ranked as set forth in subsection b., of this Section 4.18.060 A. 1., except that the highest ranking shall be given equally to minority/women's businesses without subcontractors and such businesses which use only minority/women's businesses as subcontractors and such businesses which use only minority/women's businesses as subcontractors, suppliers or in similar assisting roles. The lowest ranking shall be given to non-minority/non-women's businesses that do not use minority/women's businesses as subcontractors, suppliers or in similar assisting roles.

d. All responding parties within each particular ranking shall be grouped according to the amount of their bid, with low bidders receiving the highest priority. The lowest bidder within the highest ranking category shall be awarded the contract in question. In the event two or more responding parties qualify for award of the contract in question, they shall be notified and allowed the opportunity to resubmit their bids. The lowest bidder shall then be awarded the contract.

2. For every construction, architectural and engineering, and consultant contracts the following set aside requirements shall be met:

a. Contracts for construction, consultant and architectural/engineering services, the estimated cost of which exceeds ten thousand dollars, shall require responding parties to include in their responses to solicitation both minority and women's business participation in the contract in a percentage which equals or exceeds the percentages determined for the contract by the director of the department of executive administration. The director shall determine the percentages for each contract based on the extent of subcontracting opportunities presented by the contract and the availability of minority and women's business enterprises qualified to perform such subcontracting work. Such percentages may be higher or lower than the annual goals for the type of contract involved.

b. Where a contract is awarded to a minority or women's business, the set aside requirements of these subsections shall not apply.

c. As part of the bid package, all responding parties shall identify the dollar amount of minority/women's business participation. All responding parties shall also identify the particular minority/women's businesses to be used in performing the contract, specifying for each the dollar value of the participation, the type of work to be performed, and other information as may reasonably be required to determine the responsiveness of the bid or proposal; provided that, for bids on construction contracts, this information shall be submitted no later than the close of the first King County business day after bid opening.

d. During the term of the contract, any failure to comply with the percentages of minority/women's business participation identified in the bid or proposal shall be considered a material breach of contract. The dollar value of the total contract used for the calculation of the set-aside shall be increased or decreased to reflect executed change orders unless:

(1) a waiver is obtained in accordance with K.C.C. 4.18.070A. after consultation among the contract awarding authority, the director

of the department of executive administration, and the contractor; or

(2) the department obtains a reduction in the amount of the set aside according to the procedure in K.C.C. 4.18.060B., except that the reduction request for change orders need not be submitted prior to solicitation of bids or proposals.

B. Departments may request a reduction in the amount of the set aside for either or both minority business enterprises or women's business enterprises, by submitting the reasons therefor in writing to the director, department of executive administration, prior to solicitation of bids or proposals.

1. The director may grant such a reduction upon determination that:

a. The reasonable and necessary requirements of the contract render subcontracting or other participation of businesses other than the bidder or proposer infeasible at the adopted goal levels; or

b. Qualified minority and women's business enterprises capable of providing the goods or services required by the contract, are unavailable in the market area of the project, despite every feasible attempt to locate appropriate minority and women's business enterprises to meet adopted goals.

c. The available minority and/or women's businesses have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

2. Any reductions in set aside amount granted by the director shall specify the amount to which the set aside has been reduced.

C. Where this Section 4.18.060 specifies that a set aside or a percentage factor shall be used for a particular type of contract, the method specified is the preferred method for achieving the utilization goals. A department may use the other method in its solicitation documents for a specific contract if it determines that a method other than the one established by this Section 4.18.060 will be a more feasible method of achieving the annual utilization goal. In the event that a department chooses to use a method other than the one specified in this Section 4.18.060, it shall include in its annual report to the executive as required by Section 4.18.080 D. of this chapter, documents demonstrating that a method other than the one established by this Section 4.18.060 is a more feasible method of achieving the annual utilization goal.

D. All solicitation documents shall include the applicable requirements of Sections 4.18.050 and 4.18.060. In addition, documents shall include a pro-

vision prohibiting any agreement between a responding party and a minority/women's business in which the minority/women's business promises not to provide subcontracting quotations to other responding or potential responding parties. Bids, proposals, and other responses which fail to meet the requirements of this Section 4.18.060 shall, within the limitations of federal and state law, be deemed non-responsive unless a waiver has been granted pursuant to Section 4.18.070 of this chapter.

E. The percentage factor and set aside requirements of this Section 4.18.060 shall not apply to contracts awarded for the remainder of any calendar year in which the contracts awarded for the remainder of any calendar year in which the contract awarding authority is determined by the director, department of executive administration, to have met the applicable county utilization goals as established by this chapter. The percentage factor and set aside provisions of this Section 4.18.060 shall again apply in each succeeding calendar year until the annual utilization goals for that year have been met by the contract awarding authority.

F. For the Kingdome food and beverage concession contract, the set aside method of achieving utilization goals shall apply.

G. The requirements of this Section 4.18.060 shall cease to apply to contracts awarded by King

County and its departments on December 31, 1992, unless reenacted by the King County council.

4.18.070 **Waivers**. Contract awarding authorities, along with or on behalf of responding parties and contractors, may apply for waiver of one or more requirements of this chapter as they apply to a particular contract or contracts.

A. Waivers may be granted by the director, department of executive administration, in any of the following circumstances:

1. When the needed goods and services are readily available from only one source, in which case the contacting awarding authority shall, in addition to the requirements contained in Ordinance No. 4551, K.C.C. 4.16.030, submit a written justification of the need for sole source treatment to the director, department of executive administration, who shall grant or deny the request for waiver within three business days;

2. Emergencies, in which case emergency contracting shall be handled in accordance with the requirements of Ordinance No. 4551, K.C.C. 4.16.050.

3. Contracts for which neither a minority nor a women's business is available to provide needed goods or services, in which case a waiver may be applied for in accordance with procedures to be developed by the director, department of executive

administration. Prior to granting a waiver, the director, department of executive administration, shall certify that a minority/women's business is in fact not available to provide the needed goods and/or services.

4. Contracts awarded to non-profit organizations, governments and governmental organizations other than King County, including but not limited to municipal corporations, consortiums and association of governmental agencies or officials and agencies created by interlocal agreement, per R.C.W. 39.34, or by operation of state or federal law; where because of a responding party's non-profit status, ownership of the corporation or other entity cannot be determined. However, solely with the exception of contracts between King County and cities and towns where King County is the grantee for federal or state funds passed through to such jurisdictions, the waiver shall not apply to those profit-making contractors which contract with the referenced responding parties.

5. When available minority and/or women's businesses have given price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cover costs inflated by the present effects of discrimination.

B. Where the executive determines that the reasonable and necessary requirements of a contract render subcontracting or other participation of

businesses other than a responding party unfeasible, he/she may grant a waiver from the set aside provisions of this chapter; PROVIDED THAT, the waiver shall not be granted after the solicitation request has been publicly released by the contract awarding authority; PROVIDED FURTHER THAT, the solicitation specifications shall state that the waiver has been authorized and that solicitations received, proposing subcontracting or other participation of business other than the responding party, shall be rejected as non-responsive; PROVIDED FURTHER THAT, following award of the contract, should subcontracting or participation of businesses other than the responding party become necessary, the previously authorized waiver shall be null and void. The contractor (original responding party) shall solicit both minority and women business participation in a percentage which equals the contract awarding authority's annual goal.

C. Where the executive determines that compliance with the requirements of this chapter would impose an unwarranted economic burden on, or risk to, King County as compared with the degree to which the purposes and policies of this chapter would be further by requiring compliance he/she may reduce or waive the utilization requirements of this ordinance;

PROVIDED THAT upon taking such action, the King County executive shall notify the members of the King County council in writing and FURTHER

PROVIDED, upon receipt of the notice, if the King County council determines that the waiver does not meet the standards of this section, the King County council may by motion, within ten working days of the receipt of the notice determine the waiver to be null and void.

4.18.080 **Monitoring, reporting, and enforcement.**

A. The county executive, through the director, department of executive administration, shall have the responsibility for monitoring implementation of the requirements of this chapter and shall have the power to request from departments, responding parties and/or contractors any relevant records, information and documents.

B. Contract awarding authorities, with the assistance of the director, department of executive administration, shall keep complete and detailed records regarding compliance with this chapter. The records shall include the dollar value and the subject matter of each contract along with the name of the contractor, the participation levels; (in dollars, number of contracts awarded, and type of work), of minority/women's businesses where the contract award provides for participation, and other information as the director, department of executive administration deems necessary.

C. The director, department of executive administration, shall be responsible for gathering all

information concerning compliance with this chapter and shall have access to all pertinent King County records.

D. With the assistance of the director, department of executive administration, each department shall submit to the King County executive an annual report on its performance in meeting the utilization goals required by this chapter on or before February 15th of each year. This report shall include the number and dollar amount of contracts awarded; the number and dollar amount of contracts with minority/women's business participation; the number of contracts which involved the use of subcontractors, suppliers or similar assisting roles; the number of minority/women's businesses used in such roles; the number, type, and dollar amount of contracts awarded pursuant to the percentage factor and set aside provisions of this chapter; and the basis on which the department determined that a method other than the one specified in Section 4.18.060 of the chapter should be used. The report shall also identify problems in meeting the requirements of this chapter, if any, and suggestions for improvements.

E. Certification and Recognition Process.

1. Pursuant to chap. 328, Laws of 1987, the Office of Minority and Women's Businesses of the State of Washington shall be solely responsible for certifying and decertifying businesses. King County's minority and women's business enterprise program is

only for minorities and minority business and women's businesses and combination businesses as defined in K.C.C. 4.18.010; therefore the director, department of executive administration, shall recognize only those combination minority and women's business enterprises or minority business enterprises certified by the State of Washington which also meet the definitions of K.C.C. 4.18.010, according to minority status information provided to King County by the Office of Minority and Women's Businesses of the State of Washington. Businesses are only eligible for King County's programs so long as they remain certified by the State of Washington.

2. It shall be considered a violation of this chapter to obtain, or attempt to obtain, certification or the benefits of any provision of this chapter, on the basis of false or misleading information, whether provided to King County or to the Office of Minority and Women's Businesses of the State of Washington.

3. No contract requiring or proposing minority/women's business participation may be entered into unless all minority/women's businesses identified to meet the utilization goals by a responding party were, at the time the bid was submitted, certified by the Office of Minority and Women's Businesses of the State of Washington and recognized by the director, department of executive administration, as eligible to participate in King County's minority/women's business program and the

administration, as eligible to participate in King County's minority/women's business program and the director, department of executive administration, determines all identified minority/women's businesses appear able to perform a commercially useful function on that contract as proposed. Lists of certified and recognized minority/women's businesses shall be provided to all departments and made available to the public.

4. No business shall apply to King County in order to participate in the programs established by this chapter.

F. Upon receipt of a written and signed allegation that any contractor, subcontractor, or vendor has violated any provision of this chapter, or if a violation is discovered from information gained through compliance monitoring, or upon reason to believe that a violation may be occurring, the director, department of executive administration, or his or her designee, shall order an investigation. If there is probable cause to believe that a violation has occurred, the director, department of executive administration, or his/her designee will, upon ten days' written notice to the alleged violating party, conduct a hearing to determine whether a violation has occurred. The hearing shall be recorded and each party shall have the right to call and examine witnesses, and to be represented by anyone of his/her choice lawfully permitted to do so. The parties shall include the complainant, if any, the alleged violating

the investigation. The director, department of executive administration, may suspend progress payments on a contract pending the outcome of the hearing. Unless otherwise agreed to by all parties, the hearing shall be commenced no later than twenty-one days after service of a written notice of violation.

G. After the hearing, the director, department of executive administration, shall make written findings and conclusions and shall order one or more of the following:

1. Dismissal of the complaint when a violation is found not to have occurred;

2. Suspension or cancellation of the contract in part or in whole;

3. Disqualification and/or debarment of the violator from participation in county contracts for a period of up to five years;

4. Exclusion of the violator from future contracts or vending until demonstration of compliance;

5. Enforcement of any provision of the contract providing remedies, such as penalties or liquidated damages for violation of contractual provisions, or enforcement of any other remedy available under the laws of King County. Upon finding by the director that a contractor has in fact

failed to perform a commercially useful function or has operated as a broker, front, conduit or pass through business, liquidated damages specified in the contract shall be imposed unless the director finds that imposition of such damages would be clearly inequitable, in which case the director may order appropriate relief.

H. Upon receipt of a written and signed allegation that any contract awarding authority has violated any provision of this chapter, or if a violation is discovered from information gained through compliance monitoring, the King County executive shall order an investigation. If there is probable cause to believe that a violation has occurred, the executive or his/her designee will, upon ten days' written notice to the alleged violating party, conduct a hearing to determine whether or not a violation has occurred. The hearing shall be recorded and each party shall have the right to call and examine witnesses, to produce documentary and physical evidence, to cross-examine witnesses, and to be represented by anyone of his/her choice lawfully permitted to do so. The parties shall include the complainant, if any, the alleged violating party, and a representative of the executive or the agency conducting the investigation. Unless otherwise agreed to by all parties, the hearing shall be commenced no later than twenty-one days after service of a written notice of violation.

I. After the hearing, the King County executive shall make written findings and conclusions and shall order one or more of the following:

1. Dismissal of the complaint when a violation is found not to have occurred;

2. Corrective personnel action;

3. Disqualification and suspension of authority of all members, any board, commission, or other body constituting the violating contract awarding authority;

4. Enforcement of any other remedy available under the laws of King County.

J. Upon receipt of a written and signed allegation that a business owner is improperly being considered to be, or has improperly been rejected as, a minority business or women's business as defined in this chapter, or that a waiver or reduction of set-aside requirements has been improperly denied or granted, or if such information is discovered from information gained through compliance monitoring, the King County executive shall order that an investigation be conducted by the director, department of executive administration. The pendency of such allegations or of subsequent hearings on such allegations shall not be grounds to postpone or restrain the award of any contracts then being advertised or for which bids have been received. If there is probable

cause to believe that corrective action is warranted, the executive or his/her designee will, upon ten days' written notice to all interested parties of whom he/she is aware, and upon publication of notice of the hearing in the manner provided for the advertising of contracts, conduct a hearing to determine whether or not the allegation is correct. The hearing shall be recorded and each interested party shall have the right to call and examine witnesses, to produce documentary and physical evidence, to cross-examine witnesses, and to be represented by anyone of his/her choice lawfully permitted to do so. The hearing officer shall permit testimony to be given by any parties which would be directly affected by the matter, and a representative of the executive or agency conducting the investigation.

After the hearing, the King County executive shall make findings and conclusions and shall order appropriate corrective action, if any.

K. In addition to any other remedy available under the laws of King County and the State of Washington any person, firm, corporation, business, union, or organization which prevents or interferes with a contractor and/or subcontractor's efforts to comply with the requirements of this chapter or which submits false or misleading information to any King County department or employee concerning compliance with this chapter shall be subject to a civil penalty of up to five thousand dollars for each occurrence, King County having previously complied

with the notice and hearing provisions of this ordinance. Each submission of false or misleading information shall constitute a separate occurrence.

L. When conducting any investigation or preparing for a hearing under this section, the director shall have authority to sign and issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence including but not limited to books, records, correspondence of documents in the possession or under the control of the person subpoenaed, and access to evidence for the purpose of examination and copying as are necessary for the investigation. The director shall consult with the prosecuting attorney before issuing any subpoena under this section. If an individual fails to obey a subpoena, or obeys a subpoena but refuses to testify when requested concerning any matter under investigation, the director may invoke the aid of the King County prosecuting attorney who may petition to the Superior Court for King County for an order or other appropriate action necessary to secure enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, and shall set forth in what specific manner the subpoena has not been complied with, and shall ask an order of the court to compel the witness to appear and testify or cooperate in the investigation.

4.18.090 **Annual report required.** In addition to the executive's proposing minority/women's business contracting goals and programs in the required

annual Affirmative Action Plan, the Affirmative Action Plan shall include a report to the council detailing performance of the program. At a minimum, the report shall:

A. Provide statistical evidence, supported by a narrative explanation where appropriate, showing contacts awarded to minority/women's business, by type of contract, dollar value, and contract awarding authority;

B. If any contractor, contact awarding authority, department, has been granted a waiver from the provisions of this chapter, identifying the specific contract or bid process, parties involved and the reasons for the waiver's approval.

C. As appropriate, identify actions taken, by individual case, where it has been alleged that a contractor, subcontractor, vendor or contract awarding authority has violated the provisions of this chapter.

D. As appropriate, recommend amendments to the chapter, substantiated by fact, designed to accomplish overall program goals in a cost-effective manner.

4.18.100 **Authorization to implement procedures.** The county executive shall implement such forms, administrative processes, and operational procedures as are necessary to comply with the provisions of this chapter by February 1, 1988; provided that such

forms, processes and procedures shall be promulgated in compliance with Chapter 2.98; Rules of County agencies, with the exception that administrative rules and regulations related to this chapter shall be submitted for review by the administration and justice committee (or its successor committee) fifteen days prior to filing with the clerk of the council, the provisions of Chapter 2.98 notwithstanding.

4.18.110 **Effective of ordinance, status of solicitations**. Each of the provisions of this chapter shall apply to all contracts for which a solicitation is released after the effective date of that provision of this chapter.

4.18.115 **Effective date**. Sections 4.18.010 and 4.18.080 of this chapter shall take effect on January 1, 1988. All other sections of this chapter shall take effect as provided in the King County charter.

4.18.120 **Severability**. The provisions of this chapter shall be effective in all cases unless otherwise provided for by the State or Federal Law. The provisions of this chapter are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this chapter or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this chapter, or the validity of its application to other persons or circumstances.

4.18.130 **Study and Report.** The county executive is authorized and directed to enter into a contract with a qualified consultant to study the discrimination against minority and women's businesses in the market areas from which King County draws contractors and to recommend any appropriate changes in King County's minority and women's business program or other ordinances. The county executive shall report the results of this study to the county council on or before August 31, 1989.

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

(3)

No. 91-755

In The

Supreme Court of the United States

October Term, 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

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December 6, 1991

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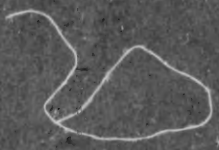

QUESTIONS PRESENTED

1. Whether there are special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture?

2. Whether the Ninth Circuit correctly held that two post-enactment studies should be considered by the district court on remand to determine whether adequate factual justification exists to support adoption of the County's MBE program in 1989?

3. Whether the Ninth Circuit correctly held that petitioner Coral Construction Company must prove on remand that its failure to be awarded a public construction contract was proximately caused by the geographical overbreadth of the County's MBE program to recover damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Petitioner Coral Construction Company is an Oregon corporation. Its parent company is MNC Investment Incorporated, an Oregon corporation. Petitioner Oregon Columbia Chapter of the Associated General Contractors of America, Inc. is an Oregon nonprofit corporation and has no parent company or subsidiaries. Respondent King County, Washington is a political subdivision of the State of Washington. It is a "home rule charter county" created pursuant to Article 11, Section 4 of the Washington Constitution.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 941 F.2d 910 (9th Cir. 1991). (App. 1-59). The opinion of the United States District Court for the Western District of Washington is reported at 729 F. Supp. 734 (W.D. Wash. 1989). (App. 60-77).

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was rendered on August 8, 1991. The petition for writ of

certiorari was filed on November 6, 1991. Petitioners have invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent King County accepts the statement of constitutional provisions, statutes and regulations involved as set forth by petitioners.

STATEMENT OF THE CASE

This case arises out of a claim for damages by petitioner Coral Construction Company ("Coral"), based on the award by respondent King County ("County") of a public construction contract to another firm. The contract at issue was awarded pursuant to the provisions of the County's Minority and Women's Business Enterprise ("MWBE") program. Also at issue are claims by Coral and petitioner Associated General Contractors of America ("AGC") for declaratory and injunctive relief.

In 1981, the County enacted a program to remedy the problem of discrimination against minority-owned businesses (MBEs) and women-owned businesses (WBEs) seeking to contract or subcontract on county business. Following the Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the County amended its program to meet the requirements of that decision. *See* King County, Wash., Ordinance 8937 (May 1, 1989), codified as KING COUNTY CODE CHAPTER 4.18 ("Ordinance").

(App. 78-124). It is the 1989 version of the Ordinance that is primarily at issue in this case.[1]

The Ordinance employs two distinct mechanisms by which county contracts are awarded and the disadvantages experienced by MBEs and WBEs redressed. These mechanisms are referred to as the "percentage preference" and "subcontractor set-aside" methods. In general, the percentage preference method applies to contracts of $10,000 or less. It gives a slight preference to bids from businesses which are MBEs or WBEs, or to bidders who agree to use such businesses as subcontractors. KING COUNTY, WASH., CODE § 4.18.060(A)(1). (App. 102-04). The set-aside method applies to contracts in excess of $10,000, and requires bidders to use MBEs and WBEs for specific amounts of the subcontracting work on the contract. *See id.* at § 4.18.060(A)(2). (App. 105-07).

While the set-aside method would ordinarily have been applied to the award of the contract at issue, § 4.18.060(C) permits the County, prior to bid, to choose one method over the other if it will "be a more feasible method of achieving" the County's overall annual goals for participation by MBEs and WBEs. (App. 108). Pursuant to this authority, the percentage preference method was used to award the contract in this case. *Coral Construction Co. v. King County*, 941 F.2d 910, 914 (9th Cir. 1991). (App. 6).

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[1] As discussed *infra*, the Ordinance was further amended in 1990.

The circumstances giving rise to this controversy began in September 1989, when the County invited bids on a contract to install guardrails along roads at various locations within King County. Bids were opened on September 28, 1989. In terms of absolute dollars, the low bidder was Coral at $178,100. Taking into account the "percentage preference" provisions of the Ordinance, however, the contract was awarded to Dirt & Aggregate Interchange, Inc. (Dirt & Aggregate), an Oregon-based MBE which submitted a bid of $185,153.50. *Id.*

Petitioners filed the present lawsuit in the United States District Court for the Western District of Washington, alleging that the County's MWBE program, on its face and as applied to Coral, violated the Constitution's equal protection clause and two federal civil rights statutes, 42 U.S.C. § 1983 and 42 U.S.C. § 1981. Petitioners sought damages, injunctive and declaratory relief, and attorney's fees. *Id.* at 914-15 (App. 6).

The district court, on cross-motions for summary judgment, upheld the County's MWBE program in its entirety by order dated December 4, 1989. *Coral Construction Co. v. King County*, 729 F. Supp. 734, 740 (W.D. Wash. 1989). (App. 76-77). Petitioners appealed to the Ninth Circuit.

While the case was on appeal, the County's MWBE program was amended again in 1990. *Coral*, 941 F.2d at 915 (App. 7-8). These amendments, enacted on August 29, 1990,

> incorporated two consultant reports into the record underlying the MWBE program. The first

study, prepared by Perkins Coie (and hereinafter referred to as the Perkins Coie Consultant Study), documents through statistics and anecdotal evidence the impact of discrimination in the local construction, architecture, and engineering fields. The second study, conducted by the Washington Consultant Group, focused on discrimination in the local goods and services industries. The two studies cost approximately $411,000 and were paid for by several local agencies. King County contributed $95,000.

The mechanics of the MWBE program were also altered by the August 29, 1990 amendments. The "percentage preference" method for allocating set-asides was modified; rather than using a fixed five-percent preference, a flexible-percentage preference was employed, the percentage ~~to~~ be determined on a case-by-case basis. In addition, under the amended version of the program, *all* prime contractors, even those who are themselves women- or minority-owned, are required to employ minority- and women-owned subcontractors, unless the prime contractor itself will perform twenty-five percent or more of the contract. Finally, the new ordinance requires the County's Office of Civil Rights and Compliance to monitor the effects of the MWBE program to ensure that it does not disproportionately favor a particular racial or ethnic group, and that it does not remain in force longer than is necessary to offset the effects of prior discrimination.

Id. at 915 (App. 7-8).[2]

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[2] The district court did not consider either study. A draft of the Perkins Coie Consultant Study was filed with the district

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While the appeal to the Ninth Circuit was pending, the County moved to dismiss petitioners' claims for injunctive and declaratory relief. The County argued these claims had been rendered moot by the 1990 amendment of the Ordinance.[3]

The Ninth Circuit affirmed the constitutionality of the WBE portions of the Ordinance, but reversed and remanded the district court's decision as to the MBE portions. *Id.* at 933 (App. 58-59). The County's motion for partial dismissal of the appeal on mootness grounds was denied.[4] *Id.* at 928 (App. 44).

The court remanded the case to the district court "for determination of whether the consultant studies provide adequate justification to establish a 'compelling government interest' for King County's adopting the MBE program." *Id.* at 922 (App. 26).[5]

(Continued from previous page)

court by King County in conjunction with its briefing on the cross-motions for summary judgment. The district court found it unnecessary to consider the study, however. *Coral*, 729 F. Supp. at 737 n.4 (App. 67). The Washington Consultant Group study was not released until July 1990.

[3] Neither of the lower courts has ever considered the constitutionality of the Ordinance as amended in 1990.

[4] The Ninth Circuit, recognizing the "unique procedural posture" of the case, left "the issue of continued jurisdiction" and "the question of the amended program's constitutionality – and the corresponding question of the continued necessity for injunctive or declaratory relief – to the district court for determination on remand." *Coral*, 941 F.2d at 928, 933 (App. 44-45, 59).

[5] The Ordinance, in its 1989 form, directed the County Executive to commission a report to study discrimination in

(Continued on following page)

The court also concluded that the County's MBE program was not "narrowly tailored" in one respect, finding that its definition of "minority business" could operate to give preferential treatment to MBEs that had never sought to do business in King County. *Id.* at 925-26 (App. 35-37). Because the record did not disclose whether Dirt & Aggregate was entitled to the benefit of the percentage preference in this case, however, the court remanded the question of damages. There, the court held that Coral must demonstrate "a causal link between the purported [constitutional] violation and its injury" to recover damages. *Id.* at 927 (App. 40).

Finally, the court held that petitioners' request for an award of attorney's fees was premature because no judgment in favor of either party had yet been entered. *Id.* at 933 (App. 58).

Petitioners filed a petition for a writ of certiorari to this Court on November 6, 1991.

SUMMARY OF ARGUMENT

There are no special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture.

(Continued from previous page)

King County and recommend any appropriate changes to the MWBE program. (KING COUNTY, WASH., CODE § 4.18.130). (App. 124).

Moreover, the Ninth Circuit correctly ruled that the district court should on remand consider two post-enactment studies to determine whether they provide adequate justification for the County's adoption of its MBE program in 1989. The Ninth Circuit also correctly held that Coral is not entitled to an award of damages unless it can prove on remand that the MBE program's overbroad minority business definition caused it to lose its bid to a business which the County should not have considered.

REASONS THE PETITION SHOULD BE DENIED

1. There are no special and important reasons why the petition for a writ of certiorari should be granted in this case, particularly given its unique procedural posture.

Review on writ of certiorari is a matter of judicial discretion. A petition for a writ of certiorari "will be granted only where there are special and important reasons therefor." SUPREME COURT RULE 10.1. There are no special or important reasons why the petition in this case should be granted, particularly given its unique and incomplete procedural stance.

The petition presents two questions. The first relates to the Ninth Circuit's holding that the district court should now consider two post-enactment studies in determining whether the necessary factual predicate exists to support the MBE program adopted by the County in 1989. The second relates to the Ninth Circuit's holding that Coral must on remand prove causation in order to recover damages.

Although petitioners argue otherwise, the Ninth Circuit's opinion does *not* signal a split in the circuits regarding the relevance of "post-enactment evidence" under this Court's decision in *Croson*. Petitioners assert that the Ninth Circuit's holding on this point is at odds with the Sixth Circuit's holding in *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989), which involved a challenge to a Michigan MWBE preference law. A close reading of the *Milliken* case, however, reveals that the question of whether post-enactment evidence of discrimination could be considered by the lower court was not addressed. Petitioners point to no other post-*Croson* circuit court opinion that is even arguably in conflict with the Ninth Circuit's opinion in this case.

No contention regarding a split of authority is made with respect to the question of damages. Moreover, and for the reasons set forth in greater detail below, the Ninth Circuit's decision in no manner "departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." SUPREME COURT RULE 10.1.

This case is also in a unique procedural posture. No final judgment in favor of either party has yet been entered. The district court has yet to consider certain evidence that was before it prior to its ruling on cross-motions for summary judgment. The district court might, or might not, find that this evidence sufficiently supported the County's adoption of its MBE program in 1989. The record at the district court level is also incomplete on the issue of whether the operation of the MBE program's minority business definition, which the Ninth

Circuit ruled was overbroad, caused Coral's bid to be rejected in favor of another firm.

For these reasons, denial of the petition would comport with the principle articulated in *Ashwander v. Tennessee Valley Authority*, 797 U.S. 288 (1936), under which the Court has generally refrained from passing on constitutional questions where the posture of the case makes it unnecessary to do so. Allowing this case to proceed to final judgment below may well lead to a result that makes it unnecessary to decide the issues raised in the petition. If significant constitutional issues do remain after final judgment, both sides will have the opportunity to bring those issues before this Court at that time. *See Urie v. Thompson*, 337 U.S. 163 (1949) (denial of certiorari at interlocutory stage is without prejudice as to the questions presented).

Moreover, it is possible that the district court will conclude that petitioners' claims for declaratory and injunctive relief are now moot. In that regard it should be emphasized that the *current* version of the County's MBE program is not before the Court on this petition for review. Only issues regarding the constitutionality of the *prior* version of the Ordinance, a version which is no longer even in effect, could be affected by review by the Court.

These facts also weigh heavily against acceptance of the petition. As the Court noted in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916):

> [certiorari jurisdiction] is to be exercised sparingly, and only in cases of peculiar gravity and

> general importance, or in order to secure uniformity of decision. [Citations omitted.] And, except in extraordinary cases, the writ is not issued until the final decree.

Id. at 240 U.S. at 258.

For all of these reasons, the issues presented by the petition are not of such "immediate and special importance" as to warrant plenary review by this Court.

2. The Ninth Circuit correctly ruled that two post-enactment studies should be considered by the district court on remand to determine whether they provide the factual predicate necessary to support the County's adoption of its MBE program in 1989.

The Ninth Circuit held that the district court erred in granting summary judgment to King County, in large part because it concluded that the testimonial evidence of prior discrimination which was part of the legislative record considered by the district court was insufficient, standing alone, to establish a compelling governmental interest for the County's MBE program under *Croson*. *Coral*, 941 F.2d at 919-22 (App. 20-26). The court stated:

> Undoubtedly, the written testimony of the numerous affiants suggests that there *may* be a systemic discrimination within the King County construction industry. Without a statistical foundation, the picture is incomplete. Strict scrutiny demands a fuller story. Not enough has been told so far to meet King County's burden that its program passes the "compelling governmental interest" requirement.

Id. at 919 (App. 20).

In its remand order, the Ninth Circuit directed the district court to consider two studies completed after the Ordinance was amended in 1989. *Id.* at 933 (App. 58). These two studies, containing statistical evidence documenting discrimination in King County, are referred to as the "Perkins Coie Consultant Study" and the "Washington Consultant Group Study." A draft of the Perkins Coie study was before the district court prior to its summary judgment decision. The district court expressly declined to consider the draft study, however, ruling that the testimonial evidence was sufficient to support the County's program. *Coral*, 729 F. Supp. at 737 n. 4 (App. 67).

The studies were commissioned by the County and other local governments in King County. *Coral*, 941 F.2d at 915 (App. 7-8). Significantly, the 1989 version of the Ordinance expressly authorized and directed the preparation of these studies. KING COUNTY, WASH., CODE § 4.18.130. (App. 124). Both studies have now been incorporated into the Ordinance through an amendment passed in 1990. *Coral*, 941 F.2d at 915 (App. 7).

Petitioners argue that the Ninth Circuit erred, contending that this Court's decision in *Croson* requires the constitutionality of the Ordinance to be determined solely on the basis of the evidence before the County Council at the time of enactment. Petitioners' argument, however, calls for an unduly restrictive interpretation of *Croson*, and should be rejected.

In *Croson* this Court stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.

> If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.

488 U.S. at 509. In discussing the City of Richmond, the Court also stated:

> if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Id. at 492.

Nothing in *Croson* prohibits consideration of post-enactment evidence in a case such as this one. Indeed, the plurality in *Croson* cites with approval the Sixth Circuit Court of Appeal's holding in *Ohio Contractors Association v. Keip*, 713 F.2d 167 (6th Cir. 1983), which involved a challenge to a state minority business preference statute. *Croson*, 488 U.S. at 477. It is clear that both the district court and the Sixth Circuit in *Keip* considered evidence that was *outside* of the legislative record in passing upon the constitutionality of the program at issue there. *See Keip*, 713 F.2d at 173.

The Ninth Circuit's ruling strikes an appropriate balance between the "conflicting demands sometimes placed upon a state or municipality by the Constitution." *Coral*,

941 F.2d at 920 (App. 23). As the court noted, a local government may well have a constitutional duty to take expeditious steps to redress racial discrimination within its jurisdiction once it has been identified. *Id.* At the same time, any governmental response that utilizes racial classifications must ultimately withstand the heightened scrutiny requirements set forth in *Croson*. As the Ninth Circuit noted,

> a municipality having such evidence [of discrimination] would face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably.

Coral, 914 F.2d at 921 (App. 24).

The Ninth Circuit's approach resolves this dilemma. It permits local governments to adopt narrowly tailored remedial programs when faced with significant evidence of racial discrimination within their jurisdictions. The reasonableness of the approach adopted by the Ninth Circuit is made clear by an examination of the factual circumstances at issue here, which are very different from those presented to the Court in *Croson*.

In *Croson*, the Court found that the quantity of evidence before the Richmond City Council did not even "[approach] a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." 488 U.S. at 500. In this case, by contrast, there was a "strong basis in evidence" of discrimination before the County Council in 1989. For example, "[s]everal dozen people gave written or oral descriptions of such

discrimination" to the County Council. *Coral*, 729 F. Supp. at 737 (App. 66-67). Moreover, nearly all of the "detailed and specific" evidence presented related directly "to the construction industry within the county's jurisdiction". *Id.* Nothing similar was presented in *Croson*.

It would have been wrong, and perhaps unlawful, for the County Council to have failed to act under these circumstances. The nature of the County's response, moreover, was completely reasonable. In amending the Ordinance in 1989, the County Council recognized that further study of the issue of discrimination in the King County construction industry was warranted. *See* KING COUNTY, WASH., CODE § 4.18.005(F). (App. 79-80). The County Council directed the executive to commission the studies necessary to do that, and to make recommendations for additional tailoring of the MBE program if necessary. *See id.* at § 4.18.130 (App. 124).

Those studies have now been completed. They confirm the testimonial evidence of discrimination presented to the County Council in 1989. Further refinements suggested by the studies, as well as the studies themselves, were incorporated into the Ordinance by amendment in 1990.

In short, the County has done everything it possibly could to redress, in a manner consistent with *Croson*, the effects of widespread discrimination in King County. The approach adopted by the Ninth Circuit takes account of the prior decisions of this Court while giving the County the opportunity to redress the effects of demonstrated discrimination in a reasonable and measured way.

In holding that the studies should be considered by the district court, the Ninth Circuit correctly analogized to this Court's analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n. 21 (1977) and in *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-87 (1977). As the Ninth Circuit noted, in both of those cases this Court held that once it is shown that a governmental action has been taken for a constitutionally impermissible reason, the burden shifts to the governmental actor to show that it would have taken the same action in the absence of the improper reason. Here, the Ninth Circuit's ruling essentially shifts the burden of proof in the same way: it requires the County to prove that sufficient competent and relevant statistical evidence supports its "good faith reason to believe that systemic discrimination has occurred, and is continuing to occur," in the King County construction industry. *Coral*, 941 F.2d at 921 (App. 25). As the court noted, the County bore the risk at the time of enactment "that a fuller development of the facts [would] not support the need for the program, or that the program might not be narrowly tailored." *Id.*, at 921 n. 11 (App. 25).

The Ninth Circuit's ruling also comports with the views of an eminent group of constitutional scholars, who have urged that:

> [local governments] should be allowed sufficient time to engage in good faith efforts to reevaluate their programs in light of [*Richmond v. Croson*]. If their programs are challenged during the period of reevaluation, courts should follow the practical and sensible rule, adopted in analogous constitutional contexts, that would permit local governments adequate time to

> establish the relevant factual record needed to respond to such a challenge.

Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 Yale Law Journal 1711 at 1714 (1989). This same group of scholars noted that this Court:

> has not held that minority set-aside programs initiated before the *Croson* decision must be dismantled simply because the facts justifying such programs had not been fully developed at the time those programs were in place.

Id. at 1713.

For all of these reasons, the Ninth Circuit's ruling that the post-enactment studies should be considered on remand does not warrant review by this Court on a writ of certiorari, and the petition should be denied.

3. The Ninth Circuit correctly held that Coral is not entitled to an award of damages unless it can prove on remand that its failure to be awarded the guardrail contract was proximately caused by the geographical overbreadth of the Ordinance.

In determining whether the County's MBE program was "narrowly tailored," the Ninth Circuit held that the Ordinance must "be limited in scope to the boundaries" of King County. *Coral*, 941 F.2d at 925 (App. 35-36). After finding that the Ordinance's definition of "minority business" could give preferential treatment to minority-owned businesses that had never attempted to do business in King County, the court concluded the definition was geographically overbroad. *Id.*, at 925-26 (App. 35-37).

However, because the record did "not indicate whether Coral Construction lost its bid to a business which King County should not have considered," the Ninth Circuit remanded the issue of damages to the district court. *Id.* at 926 (App. 39). There, the court held, Coral must prove "a causal link between the purported violation and its injury" in order to recover damages under either 42 U.S.C. § 1983 or 42 U.S.C. § 1981. *Id.* at 927 (App. 40).

Petitioners contend the Ninth Circuit's geographical overbreadth determination *automatically* entitles them to an award of damages and attorney's fees. Petitioners, while taking issue with the court's remand of this issue, nevertheless failed to address the issue head-on in their petition. Instead, they argue around it, claiming that the effect of the court's holding is to somehow "reconfigure" the reach of the Ordinance's minority business definition.[6]

Petitioners completely mischaracterize the Ninth Circuit's holding on the question of damages. The court did not "reconfigure" the minority business definition – it declared it to be unconstitutionally overbroad. What the court *did* do is follow the prior decisions of this Court

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[6] This purported "reconfiguring" by the Ninth Circuit is variously described by petitioners as a "disregard [of] the County Council's drafting of the Ordinance"; an effort to "rewrite" the Ordinance in "much narrower terms"; an effort to "usurp" the policymaking and legislative functions of the County Council; an act of judicial "sleight of hand"; "overreaching"; and a violation of "the venerated principle of federalism." (Pet. 19-23).

uniformly holding that even the deprivation of a constitutional right does not automatically entitle a party to an award of compensatory damages. To recover such damages, a party must prove they were *caused* by the deprivation of the right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978).

Petitioners seek damages under two federal civil rights statutes, 42 U.S.C. §§ 1983 and 1981. Both statutes grant what are essentially tort remedies to individuals who can prove they were injured in a compensable way by a deprivation of their constitutional rights. Causation is an essential element of proof under both statutes.

In *Carey*, the Court affirmed that § 1983 creates "a species of tort liability" in favor of persons who have been deprived of their constitutional rights. 435 U.S. at 253, citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Constitutional rights, however,

> do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.
>
> Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956) (emphasis in original). [Footnote omitted.] The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found . . . to be

> violative of . . . constitutional rights *and found to have caused compensable injury. . . . "* [Citations omitted].

Carey, 435 U.S. at 254-55. (Emphasis in original.) As a result, the "basic purpose" of § 1983 damages is "to compensate persons for injuries caused by the deprivation of constitutional rights". *Id.*, at 254.

The Court was even more emphatic in *Stachura*. There, the Court held that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." 477 U.S. at 306. In striking down instructions that could have permitted a jury to award damages based solely on the monetary value it placed on certain constitutional rights, the Court declared:

> We therefore hold that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases.

Id. at 310.

Like § 1983, § 1981 is in the nature of a tort remedy. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3rd Cir. 1986), *aff'd on other grounds*, 481 U.S. 604 (1987). This fact was implicitly recognized by the Court in *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976), where the use of a state's personal injury statute of limitations was found appropriate in a § 1981 case. As with its § 1983 claim, Coral must prove "a causal link between the purported [constitutional] violation and its injury to recover damages under § 1981." *Coral*, 941 F.2d at 927 (App. 40).

As the Ninth Circuit recognized, an award of damages cannot be based solely on a conclusion that the Ordinance's minority business definition is overbroad. In remanding the question of damages to the district court, the court was not engaging in "sleight of hand", rewriting the Ordinance or ignoring the legislative intent of the County Council. In fact, it was faithfully adhering to the prior decisions of this Court, by recognizing that the question of whether the MBE program's overbroad minority business definition was "the cause of Coral Construction's harm" can be resolved only on remand. *Id.*

For these reasons, the Ninth Circuit's ruling remanding the issue of causation to the district court does not warrant review on a writ of certiorari, and the petition should be denied.

CONCLUSION

The Ninth Circuit correctly ruled that the district court should now consider the two post-enactment studies to determine whether the necessary factual predicate exists to support adoption of the County's MBE program as it existed in 1989. The court's opinion takes into account the abundant testimonial evidence that *was* before the County Council at the time the program was enacted. The decision also recognizes the obligation local government has to act expeditiously to redress local discrimination it has helped to perpetuate, even when it has done so passively.

The court also correctly held that causation is an essential element of Coral's claims for damages under

both 42 U.S.C. § 1983 and 42 U.S.C. § 1981. The court's conclusion that the MBE program's minority business definition is geographically overbroad does not automatically entitle Coral to an award of damages. Coral must first prove that the operation of that provision caused it to lose its bid to a business the County should not have considered.

There are no special and important reasons why the petition for a writ of certiorari should be granted in this case. For all of these reasons, it should therefore be denied.

DATED: December 6, 1991.

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Supreme Court, U.S.
FILED
DEC 17 1991
OFFICE OF THE CLERK

NO. 91-755

In The Supreme Court Of The United States

October Term 1991

CORAL CONSTRUCTION COMPANY and OREGON COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Petitioners,

v.

KING COUNTY, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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December 17, 1991

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS'[1] REPLY BRIEF

[1] Petitioner Coral Construction Company is an Oregon corporation. Its parent company is MNC Investment Incorporated, an Oregon corporation. Petitioner Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. is an Oregon nonprofit corporation and has no parent company or subsidiaries.

REASONS FOR GRANTING THE WRIT

I. The Petition Raises Important Issues of Law Fundamental to the Further Conduct of the Case.

Respondent suggests that a writ of certiorari is inappropriate in this case due to its "unique procedural posture." Respondent's Brief at p. 9. In this regard, respondent argues that the constitutional issues raised by the admission of post-enactment evidence (never placed before or considered by the enacting legislative body) may be moot if Coral Construction Company ("Coral") ultimately prevails at trial. *Id.* at p. 10.

Respondent's argument ignores the well-settled rule that the interlocutory nature of a judgment does not preclude the issuance of a writ of certiorari in cases involving important issues of law fundamental to the further conduct of the case. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In rejecting a similar argument, Justice White, with whom Justice Brennan and Justice Powell joined, stated:

> [T]he Solicitor General opposes the petition, arguing that if petitioner is acquitted following a trial on the merits, his claims will be moot. But this would leave the conflicts among the Circuits unresolved, conflicts that are now ripe for our atten-

> tion. Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review.

Michael v. United States, 454 U.S. 950, 951-52 (1981) (White, J., with whom Justice Brennan and Justice Powell join, dissenting to denial of certiorari).

In the present case, a determination of whether the district court may consider post-enactment evidence in addressing the constitutionality of the challenged ordinance is fundamental, if not decisive, to this case. Further, the importance of the federal constitutional issues presented extends beyond the facts of this case. The propriety of a federal district court considering post-enactment evidence never considered by the enacting legislative body, in an effort to discern legislative purpose and intent, raises significant issues of federalism and the exercise of judicial powers which warrant this Court's attention.

The Ninth Circuit's decision is twice flawed. It improperly permits local legislative bodies to enact racial classifications on less than a compelling basis and compounds the error by assigning to the courts a uniquely legislative function on review of such classifications. This Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) instructs otherwise.

This Court should also reject respondent's contention that the district court may conclude that Coral's prayer for declaratory and injunctive relief is moot due to subsequent amendments of the set-aside ordinance. Of course, Coral Construction's damage claim is not moot, and contrary to respondent's suggestion, the predominant and significant aspects of the challenged ordinance remain in effect under the 1990 amendments. In particular, the scope of the racial preference, found overly broad by the Ninth Circuit, remains unchanged.

II. The Split in the Circuits Warrants This Court's Guidance.

Plenary review should be granted because of the demonstrated conflict in the circuits as to the propriety of receiving post-enactment evidence to support a racial preference. Respondent's contention that the Sixth Circuit's decision in *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989), does not conflict with the Ninth Circuit's decision in this case is plainly incorrect. In contrast to the Ninth Circuit's conclusion that post-enactment evidence may be considered on remand, the *Milliken* court expressly recognized the importance of evaluating the evidence presented to the legislative body. The court explained that it

> must decide whether the Michigan legislature, *based upon the evidentiary factual record before it*, "had a firm basis for believing

> that such action was required based on prior discrimination" by the state itself.

834 F.2d at 590 (quoting *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1360 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989)).

Michigan Road Builders is in accord with a number of other circuit court decisions which confine judicial review in similar circumstances to the evidence that was before the legislature. *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *see also Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 564 (7th Cir. 1984), *vacated*, 481 U.S. 1001 (1987), *on remand*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); and *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 810 (7th Cir. 1985), *vacated*, 783 F.2d 105 (7th Cir. 1986), *on rehearing*, 819 F.2d 766 (7th Cir.), *cert. denied*, 484 U.S. 925 (1987). The Ninth Circuit's holding below is to the contrary.

CONCLUSION

Coral's petition raises important issues of law fundamental to the further conduct of this case. Without regard to the outcome of this case at trial, the Ninth Circuit is in direct conflict with the decisions of other the circuits as to the consideration of post-enactment evidence of discrimination to justify a racial preference. Accordingly, petitioners respect-

fully urge that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

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December 17, 1991